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No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALTER L. JONES, PRO SE, PETITIONER, ET AL.,
v.
NIAGARA FRONTIER TRANSPORTATION AUTHORITY, ET AL.,

(Case No. 1.)

WALTER L. JONES, PRO SE, PETITIONER, ET AL.,
v.
SIEGFRIED CONSTRUCTION CO., INC., ET AL.,

(Case No. 2)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

PETITION FOR EXTRAORDINARY WRIT TO UNITED STATES DISTRICT COURT JUDGE JOHN T. ELFVIN

WALTER L. JONES, PRO SE
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EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALTER L. JONES, PRO SE, PETITIONER, ET AL,*

v.

NIAGARA FRONTIER TRANSPORTATION AUTHORITY, ET AL,*

(No. One Case)

WALTER L. JONES, PRO SE, PETITIONER, ET AL ,*

v.

SIEGFRIED CONSTRUCTION CO., INC ET AL,*

(No. Two Case)

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals made substantial errors and denied due process, by denying the Petitioner, Appellate review, Mandamus review, and amendment of complaint, in the No. One case.

2. Whether the U.S. Court of Appeals made substantial error, by affirming the District Court judgement, in the No. Two case, and by refusing to grant permission to amend complaints, consolidatedly, in both cases.

3. Whether the Petitioner, Pro se, as a member of the protected class, has standing to seek redress for violations of his individual statutory, and constitutional rights, as a matter of law.

4. Whether the District Court judge's impartiality might reasonably be questioned in these civil rights cases, as to call for his disqualification and recuse, from these cases.

TABLE OF CONTENTS

	Page
Opinions below	IX
Jurisdiction	IX
Constitutional and statutory provisions involved	X
Statement	1
Reasons for granting the petition	17
Conclusion	31
Appendix A	APP-1
Appendix B	APP-61
Appendix C	APP-71
Appendix D*	APP-72

TABLE OF AUTHORITIES

Cases:	Page
Armstrong v. Manzo, 380 U.S. 545, (1965)	18
Association, Etc., v. Camp, 397, U.S. 150 (1970)	22
Bass v. Hoagland, 172, F 2d, 205, (5th Cir. 1949)	20
Blackledge v. Perry, 417, U.S. 21 (1974)	20
Bird v. Electrical Workers Local No 24, 7 EPD, 7472, (1974)	23
Boddie v. Connecticut, 401, U.S. at 374, (1971)	18

Cases: (Cont.) Page

Bucholz v. Hutton, 153, F Supp. 62, 68-69, (D. Mont. 1957) 26

Burtniers v. City of New York, 716, F 2d, 986, (1983) 18

Cannon v. University of Chicago, 441, U.S. 677, (1979) 22

C. F. Orange Treatre Corp., v. Rayherst Amusement Corp., 139 F 2d, 871, 875, 322, U.S. 740 (1944) 26

Cinque v. Langton, 8 F.R. Serv. 55 B, 224 (ED N.Y. 1944) 20

City of Santa Clara, Cal., v. Andrus, 572 F 2d at 665, (1978) 21

Compagnine DesBauxites v. L'Union, 723, F 2d, 357, (1983) 27

Conley v. Gibson, et al, 355, U.S. 4, (1957) 23

Cuyler v. Sullivan, 446, U.S. 335, (1980) 19

Defigueiredo v. Trans World Airlines, Inc.,; 55 FRD 44 (1971) 28

Dieguardi v. During, 199, 2d (CA 2 1944) 23

Eakins v. Reed, 710, F 2d 184 (1983) 24

Elias v. Pitucci, 13, FRD 13, (E.D.P.A. 1952) 20

Etten v. Lovell Manu. Co., 225 F 2d 844, 846, (3rd Cir. 1955) 26

Field v. Wolfson, 41 FRD 329, (S.D.N.Y. 1967) 28

Flast v. Cohen, 392, U.S. 83, (1968) 22

Cases: (Cont.) Page

Gasoline Prod. Co., Inc., v. Champlin Refining Co., 283 U.S. 494, (1931) .....

Gladstone Realtors v. Village of Bellwood, 441, U.S. 91, 111, (1979) 23

Grannis v. Ordean, 234, U.S. 385 (1914).. 18

Haines v. Kerner, 404, U.S. 519 (1972) .. 23

Harris v. Cuyler, 664, F 2d, 388, 390, (3rd Cir. 1981) 20

Hodgson v. Liquor Salesmen's Union 444, F 2d 1344, 1348, (2nd Cir. 1921)....

Holloway v. Arkansass, 335, U.S. 475, (1978) 19

Howard Sect. Ser. v. Johns Hopkins, 516, F Supp. 508 (1981) 23

Hutton, et al v. Fisher, et al, 359, F 2d 913 (1966) 20

Jones v. N.F.T.A., et al, (not reported) (1985) 19

Jones v. Smith, 99 F.R.D. 4 (M D 1983)... 20

Katz v. Realty Equities Corp., of N.Y., 521 F 2d 1354, (2nd Cir. 1975) 28

Kenvin v. Newburger, Loeb & Co., 32 FRD 473 (S.D.N.Y. 1965) 27

Local No. 1 (ACA) v. Intern. Bro., 614, F 2d 846, (1980 25

Macallister v. Guterma, 263 F 2d 65, 68 (2nd Cir. 1958) 28

Magnavox Co., v. APF Electronics, Inc., 496 F Supp. 29 (1980) 27

Cases: (Cont.) Page

Miller v. Stanmore, 636 F 2d 986 (1981) . 18

Mims v. Shapp, 541, F 2d, 415, 417, (3rd Cir. 1976) 29

Minority Emp., etc., v. Tenn. Dept. Employ. Sec., 573 F Supp. 1346 (1983) ... 23

North Carolina v. Pearce, 395, U.S. 711 (1969) 30

New York v. New York, N.H. & H.R., Co., -344, U.S. 293 18

Public Serv. Mutual Ins. Co., v. Cohen, 616, F 2d, 704, 707, (3rd Cir. 1980) ...

Radakovich v. Weisman, 241, PA. Supper 35, 359 A 2d 426, 430-436 (1976) 26

Reeves v. City of Jackson, Miss., 532, F 2d 491, 493 (1976) .....

Rogers v. Arzt, 1 F.R.D., 581 (S.D.N.Y. 1941) 20

Rotoro v. Borough of Charleroi, 532, F 2d 920 (1976) 25

Sames v. Gable, 732, F 2d 49 (1984) 27

Santa Clara v. Martinez, 436, U.S. at 79 (1978) .....

Schlafly v. Volpe, 7 E.P.D. 7379 (1974).. 23

Schroeder v. City of New York, 371, U.S. 208 18

Societe, et al, v. Rodgers, 357, U.S. 197, 206, (1958) 20

Southern Pacific Term. Co., v. I.C.C., 219, U.S. 498, 515, (1911) 21

Cases: (Cont.) Page

Tate v. Smith, 401, U.S. 395, (1971) 31

Thomas v. Furness, 171 F 2d 434, 435, (9th Cir. 1948) 26

Trafficante, et al, v. Metropolitan Life, et al, 409, U.S. 205, (1972) 22

United Airlines, Inc., v. Wiener, 286, F 2d 302 (1962) 27

United States v. Andrews, 633, F 2d 449 (1980) 30

United States v. Holland, 655, F 2d 44 (1981) 29

United States v. Thompson, 483, F 2d 527, (1973) 29

University of California v. Bakkee, 438, U.S. 265, (1978) 23

Vuitton Et Fils SA., 606, F 2d, 1 (1979) 21

Walker v. Hutchinson City, 352, U.S., 112,(1956) 18

Warth v. Seldin, 422, U.S. at 501, (1975) 23

Watson v. Jones, 13 Wall, 679, 715 (1871) 26

Webbe v. McGhie Land Title Co., 549, F 2d 1358 (10th Cir. 1977) 29

Woods v. State of Georgia, 450, U.S. 261 (1981) 19

Constitution, statutes and regulations:

		Page
1.	The United States Constitution:	
	Fifth Amendment	XI
	Fourteenth Amendment	XI
	Section 2 of Article III of the Constitution	XI
2.	Civil Rights Act of 1964, Title VI 42 USC, 2000d - 1 Pub. L. 88.352 ..	XI
3.	Urban Mass Transportation Act of 1964,49 USC, Section 19, as amended,(Pub. L 95.599)	XII
4.	U,M,T,A, Circular 1165.1, as amended	XII
	Title 49, - Transportation, Part 23	XIII
5.	Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1978, (49 USC 1730)..	XIII
6.	Section 30 of the Airport and Airway Development Act of 1970, as amended, (49 USC 1730)	XIII
7.	Section 1981 of 42 USC	XIV
8.	Section 1983 of 42 USC	XIV
9.	Section 1985 (3) of 42 USC	XIV
10.	Section 1986 of 42 USC	XV
11.	Section 1341 of 28 USC	XV

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OCTOBER TERM, 1986

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WALTER L. JONES, PRO SE, PETITIONER, ET AL,*
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
AND
PETITION FOR EXTRAORDINARY WRIT TO UNITED STATES DISTRICT COURT JUDGE JOHN T. ELFVIN, W.D.N.Y.

The Petitioner, Walter L. Jones, on behalf of himself, Pro se, petitions for a Writ of Certiorari, to review the determinations of the United States Court of Appeals, for the Second Circuit, and an Extraordinary Writ to District Court Judge, John T. Elfvin, W.D.N.Y., in the above captioned cases.

OPINIONS BELOW

The opinions of the Court of Appeals, in the above cases, App. A. infra 1-3, and APP. B. infra 61-65 are not reported, and the opinions of the District Court in the above cases, App. A, infra 4-60, and APP. B. infra 66-70, are not reported.

JURISDICTION

The decisions of the Court of Appeals in the No. One case (App. A. infra. 1-2) were entered on January 23, 1986. A petition for rehearing was denied on April 16, 1986. (App. A. infra 3). The judgement of the Court of Appeals, in the No. Two case was entered on May 8, 1986 (App. B. infra 61-65 . On June 25, 1986, the Hon. Mr. Justice Marshall extended the time with which to file a petition for a Writ of Certiorari, to August 5, 1986. The original jurisdiction of this court is invoked under Article III of the Constitution, 28 USC, §1254.1 (1), and 28 USC §1651(A).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides in relevant part:

"No person shall * * * be deprived of life, liberty, or property, without due process of law", * * *.

2. The Fourteenth Amendment of the United States Constitution provides in relevant part:

"No state shall make or enforce any law which shall * * * abridge the privileges or immunities of citizens of the United States * * *, or shall any state * * * deprive any person of life, liberty, or property, without due process of law * * *; nor deny to any person within its jurisdiction, the equal protection of the law." * * * .

3. Section 2 of Article III of the Constitution provides in relevant part:

(a) "The court's judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States; - to controversies, to which the United States shall be a party; - to controversies between citizens of differing states, and between a state, or the citizens thereof."

(b) "The Supreme Court shall have original jurisdiction in those cases in which the state shall be a party."

4. Section 601 of Title VI under the Civil Rights Act of 1964, Pub. L. No. 88 - 352, 78 Stat. 252, at 42 USC, 2000d.1, provides in relevant part:

(a) "No person in the United States shall * * * on grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination, under any program, or activity receiving

federal financial assistance."

(b) Each federal department and agency which is empowered to extend federal financial assistance to any program or activity, by way of grants, loans, or contracts, is authorized and directed to effectuate the provisions of Section 601, under Title VI, with respect to such programs or activity, by issuing rules, regulations, or orders of general applicability, which shall be consistent with achievement of the objective of the statute.

5. Section 12(f) of the Urban Mass Transportation Act of 1964, as amended, 49 USC, 1608(F), as amended by Section 314, as amended by Section of Pub. L. No. 95 - 599, codified at 49, USC 1615, and 42 USC 2000d, provides:

"No person in the United States, on the grounds of race, color, creed, national origin, sex, or age, shall be excluded from participation in, denied the benefits of, or be subjected to discrimination under any project, program, or activity funded, in whole or in part, through financial assistance, under this Act. The provisions of this Section shall apply to employment and business opportunities, and shall be considered to be in addition to, and not in lieu of the provisions of Title VI of the Civil Rights Act of 1964."

6. UMTA Circular 1165.1, dated December 30, 1977, provides in relevant part:

(a) It is UMTA's policy that MBEs shall have the maximum opportunity to participate in the performance of contracts financed, in whole, or in part, with UMTA funds.

(b) UMTA's current program assistance guidelines require a grant recipient to make its "best efforts", to assure that MBEs have an equitable opportunity to compete in contracting activities, and where the grant exceeds $1,000,000.00, to establish an affirmative

action program for MBE participation, including the appointment of a liaison officer, and support staff to administer such program.

(c) This Circular strengthens the current MBE requirements applicable to UMTA grant recipients, by making the approval of a written MBE Program a condition of grant awards for certain applicants. The policy and practices governing MBE participation, in direct UMTA procurements (the "internal MBE Program") will continue, as defined in the administrator's order of February 28, 1975, entitled; "Directives Pertaining to Minority Business Enterprise."

7. Title 49 Transportation Sec, 23, dated March 31, 1980, provides:

(a) The purposes of this part is to carry out the Department of Transportation's policy of supporting the fullest possible participation of firms oweded and controlled by minorities and women (MBEs), in Department of Transportation programs. This includes assisting MBEs throughout the life of contracts in which they participate.

(b) This part implements, in part, Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); section 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1730); Section 19 of the Urban Mass Transportation Act of 1964, as amended (Pub. L. 95 - 599); Title VI of the Civil Rights Act of 1964, (42 U.S.C. 471, et seq.); and Title 23 of the U.S. Code, (relating to highways and highway safety). This regulation supercedes all DOT regulations issued previously under these authorities, insofar as such regulations affect minority business enterprise matters in DOT financial assistance programs.

8. Section 603 of Title VI under the Civil Rights Act of 1964, Section 2000d, et seq., Pub. L., No. 95 - 599, in relevant parts provide:

"Any person aggrieved, may obtain judicial

review, in accordance with Section 10 of the Administrative Procedure Act, under 60 Stat. 243."

9. Section 1981 of 42 U.S.C., provides in relevant part:

"All persons, within the jurisdiction of the United States shall have the same right, in every state and territory, to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens."

10. Section 1983 of 42 U.S.C. provides in relevant part:

"Every person who, under color of any statutory ordinance, regulation, custom or usage, of any state or territory, or the District of Columbia. subjects, or causes to be subjected, any citizen of the United States, or other persons within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding, for redress."

11. Section 1985 (3) of 42 U.S.C. provides in relevant part:

(a) If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly, or indirectly, any person or class of persons, of the equal protection of the law, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory, from giving or securing to all persons within such state or territory, the equal protection of the law;

(b) In any case of conspiracy set forth

in this section, if one or more persons engaged therein, do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured, or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one, or more of the conspirators.

12. Section 1986 of 42 U.S.C. provides in relevant part:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this Title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do , if such wrongful act be committed, shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which such person, by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal, may be joined as Defendants in the action."

13. Section 1341 of 28 U.S.C. provides:

(a) The Disrict Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section 1985 of Title 42, which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT

The Petitioner refers to his Brief, Reply Brief, Addenda, Appendix, and Records on file with the U.S. Court of Appeal, for the Second Circuit; which have been requested to be transmitted to this court. APP. C, infra 71.

1. In 1964, Congress enacted the Civil Rights Act, (Civil Rights Act of 1964), in order to provide political, economical, and social equality for Negroes (Blacks) of the United States of America, (the Civil Rights Act of 1964), Pub. L., No. 88 - 352, 78 Stat., 252, codified at 42 USC, 2000d, et seq. In 1964 Congress further, created the Urban Mass Transportation Administration (UMTA) Act of 1964, Section 12(f), as amended, 49 USC, 1608(f), as amended by Section 314, as amended by Section 19 of Pub. L., No. 95 - 599, codified at 49 USC, 1615, and 42 USC, 2000d, et seq. This act authorized the Administration to make financial grants to

authorized state, and local agencies, in order to establish mass transportation systems within certain localities. Pursuant to these provisions, Respondent-UMTA granted the Respondent-Niagara Frontier Transportation Authority, (NFTA), 80% of the total cost of a local mass transportation system, (Buffalo Subway); costing over Five Hundred Million Dollars, between 1978 and 1986.

Section 601 of this "Act" prohibits any recipients of UMTA funds from discriminating, on the basis of "race, color, creed, national origin, sex, or age". At all times relevant to this litigation, UMTA Circular 1165.1, as amended by Title 49 - Transportation Part 23 required that any recipient receiving UMTA funds, establish a written Minority Business Enterprise (MBE) Program, describing the "affirmative" steps that would be implemented to involve MBEs in all phases of the activities, as a binding condition of receiving the grant, and as a binding, contractual obligation for the administration of the funds, under the "Act".

NFTA prepared and submitted its required,

written MBE Program (Agreement) to UMTA, as a conditional part of the federal grant funding contract.

The MBE Program (Agreement) provided:

"The Authority (NFTA) will assist MBEs in overcoming barriers to participation, by the following means":

(a) "Coordinating with financial institutions, insurance and bonding companies, and prime contractors to alleviate financial barriers faced by MBEs;"

(b) "Where feasible, NFTA will speed up payment schedule for MBEs to alleviate cash flow problems;" CA App. 86-97, 106, 132-137, 143-145, R 218, Exhibit 14.

Title 49 Transportation §23.73, dated March 30, 1980 expressly prohibits discrimination, intimidation, and retalitory acts by the recipient and contractors. (CA App. 74), R 218, Exhibit 1, page 124.

2. Beginning on or about September 27, 1978, up to and including September of 1981, the Petitioner, a Negro (Black) made consistent, documented efforts to obtain bonding assistance, financ-

ial assistance, and contracts on the federally funded Buffalo Subway Construction Project, from the Respondent-NFTA and Respondents-(White owned, unionized) contracting firms, and their officers; all of which was intentionally and purposefully rejected, through a conspiracy to deny the Petitioner any benefits from participation. CA App., 736-773. Also see Petitioner's Brief filed below, Ad 47-79, R 6-11.

3. In 1980, the Petitioner, Pro se, and his Co-Plaintiff, Walter L. Jones Development Corporation, Inc., owned by him, filed the original suit in the District Court for the Western District of New York, challenging the Respondents' ("egregious"), discriminatory and exclusionary practices on the federally funded Buffalo Subway Construction Project. Originally named as Defendants, were the Niagara Frontier Transportation Authority, (NFTA) Urban Mass Transportation Administration, (UMTA) and the New York Department of Transportation, (NY DOT). CA App. 237, R 1.

The government-Defendant, UMTA, filed a motion, on February 5, 1981, to dismiss, contend-

ing that the Petitioner, who is not an attorney, may not represent the Co-Plaintiff, Corporation, in the case, and that the Petitioner lacked standing to pursue his individual claims, and the complaint failed to join parties which are "indispensable", to consideration of the asserted claims. (R 19); Subsequently, the Petitioner, Pro se, on March 17, 1981 moved to amend and supplement the complaint, and hired an attorney to represent the Corporation. CA App. 238, R 35.

On March 30, 1981, the District Court issued an Order, from the bench, granting the Petitioner, and his Co-Plaintiff's attorney, leave to amend the complaint, directing service by April 3, 1981. See CA App. 238. See Docket sheet entry.

On April 3, 1981, the Petitioner, Pro se, and the Co-Plaintiff's attorney filed the ["authorized"] "Amended and Supplemental Complaint", dated March 30, 1981, inclusive of additional Parties-Defendants, seeking injunctive and monetary reliefs in the sum of $14,360,371.50 compensatory damages, and $50,000,000.00 in pun-

itive damages. CA App. 186-218, R 42.

4. On April 22, 1981, the District Court entered a Memorandum, Order and Judgement, dismissing the Petitioner's individual Pro se' civil rights claims, upon the grounds that the Petitioner had no standings to pursue his claims. CA App. 219-224, R 53, 54. The Order and Judgement of April 22, 1981 was issues without any pending motion on file, and without any hearing being had, addressing the Petitioner's claims, as alleged in the [authorized] "Amended and Supplemental Complaint", dated March 30, 1981, and filed on April 3, 1981. CA App. 237-239, R 42-53, Now see CA App. 186-218, R 42. [1]

The District Court further directed, in its Memorandum and Order, that the Petitioner's Co-Plaintiff (Corporation) may only be represented in the law suit by properly admitted counsel, notwithstanding the Petitioner's having

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[1]The Defendantants' motions to dismiss the Petitioner's [authorized] "Amended and Supplemental Complaint", dated March 30, 1981, and filed on April 3, 1981, all were filed [after] the District Court judge had dismissed the Petitioner's individual claims on April 22, 1981, R 63-65, 67, 70-72, 74-78, 80, 82, 86, 89 and 96.

already complied with this issue, which the court admittedly acknowledged, in its Order. CA App. 223-224, R, 53. See also CA App. 238 - Docket sheet entry.

5. On May 26, 1981, the Petitioner hand-delivered a letter to the District Court judge, due to his releasing the Co-Plaintiff (Corporation's) attorney, wherein the Petitioner requested (30) days to find new counsel to represent the Corporation, and advised the court that he had encountered great difficulties in finding a local attorney, who would oppose the Union Defendants. CA App. 256-257, R 218, Exhibit 5. The District Court responded to the Petitioner, by letter, dated May 26, 1981, wherein the court granted the Petitioner, until June 26, 1981, to hire and have new counsel appear in the case, by formal Stipulation. CA App. 258-259, R 218, Exhibit 5.

On June 15, 1981, the Petitioner hired an attorney, Charles L. Davis, to represent the Corporation, who executed a retainer agreement, on June 15, 1981. Petitioner confirmed the agreement, with directives, on June 16, 1981.

CA App. 260-262, R 218, Exhibit 6. The District Court formally approved the attorney's withdrawal, and substitution on June 24, 1981. CA App. 241, R 95.

On June 26, 1981, attorney Davis orally suggested that the Unions and minority (Fronts) should be dropped from the action; which was orally rejected by the Petitioner. On June 26, 1981, the Petitioner expressly advised attorney Davis not to drop the Union Defendants from the action, "under any circumstances." CA App. 263, R 218, Exhibit 7.

However, attorney Davis proceeded and moved to amend the complaint. CA App. 264-267, R 218, Exhibit 8, CA App. 242, R 98. Leave of court was granted on July 17, 1981, R 99. On August 7, 1981, attorney Davis filed an "Amended Complaint", [dated August 7, 1981] wherein said attorney dropped the State, Unions, minority (Fronts), and certain Contractor-Defendants from the action; all without the Petitioner's initial knowledge, and over the Petitioner's prior expressed objections and concerns. CA App. 269, R 218, Exhibits 5, 6,

and 7.

In addition, attorney Davis, without leave of court, and without the Petitioner's initial knowledge, prepared and filed an additional [unauthorized] complaint, entitled "Second Amended Complaint", [dated August 14, 1918]; whereupon attorney Davis fraudulently obtained the Petitioner's verification on his (attorney Davis') blank cover/jacket, on August 19, 1981, which he placed on his [unauthorized] "Second Amended Complaint", that was filed on August 20, 1981.[2] CA App. 230-241, R 103. In particular, attorney Davis represented to the Petitioner, that he needed the Petitioner's verification on the cover/jacket to attach to the Petitioner's affidavit, that was to accompany a motion for Preliminary Injunction. The affidavit was also filed on August 20, 1981. CA App. 280-298, R 104.[3]

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2 The fraudulently obtained verification (by former attorney) was to have it appear in the Record, that the Petitioner had authorized his dropping of the subject Defendants, in the [unauthorized] "Second Amended Complaint", after the judge and former attorney were expressly advised of the Petitioner's position, regarding this issue.

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3 No other pleadings in this entire case was verified, in hand, manuscript, on the cover/jacket, except the jacket that accompanied attorney Davis' [unauthorized, fraudulently filed] "Second Amended Complaint".

On August 26, 1981, at the Preliminary Injunction hearing, the Petitioner discovered that attorney Davis had amended the complaint, and dropped the subject Defendants; from which the Petitioner orally and expressly directed said attorney to reinstate the Union-Defendants. CA App. 300, R 218 Exhibit 7.

On October 7, 1981, the District Court judge entered a Memorandum and Order, in support of his Order, denying Preliminary Injunction, entered on August 28, 1981. R 108, and 113. Reported at 524, F Supp. 233, (1981).

6. On October 8, 1981, the District Court entered an Order, without notice to the Petitioner; directing the Plaintiff-Corporation's attorney (Davis), to show cause, on October 19, 1981, at 9:A.M., why the individuals and entities deleted in the "Amended Complaint", dated [August 7, 1981] "should not be dropped from the law suit, pursuant to Fed. R. Civ. P., Rule 21, and the action deemed dismissed, as to each of them." CA App. 323-325, R 115.

On October 19, 1981, the District Court, without the Petitioner's initial knowledge, not-

ed no appearance by the Co-Plaintiff's attorney, and directed the Defendants' attorneys to submit order. CA App. 243, Docket sheet notation.

On November 3, 1981, the District Court entered an Order that was signed on November 2, 1981, expressly addressing the [unauthorized] "Second Amended Complaint", dated [August 14, 1981], wherein the court dropped the Defendants, as listed in the Order to Show Cause, "without leave to further amend, and with prejudice." CA App. 326-329, R 126. Also see CA App. 323, 325, R 115. [4]

Upon attorney Davis' request, the Petitioner executed a Stipulation for his withdrawal, on October 14, 1981, and filed a motion, Pro se, for leave to amend the complaint, on October 21, 1981. CA App. 343, 345, 350-352, 155-156, R 218, pages 3-4, Exhibit 9. [5]

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4 The District Court's Order to Show Cause entered on October 8, 1981 expressly addressed the Amended Complaint, dated August 7, 1981; however the District Court's Order, entered November 3, 1981, expressly addressed attorney Davis' [unauthorized] fraudulently filed "Second Amended Complaint", dated August 14, 1981. See R 115 and 126.

5 Attorney Davis never informed the Petitioner of the District Court's Order, dropping the subject Defendants, at anytime, up to and including his withdrawal, in October of 1982.

On October 28, 1982, the Petitioner received an affidavit, dated October 27, 1982, from a Respondent-attorney, in opposition, who based his opposition upon the grounds that the District Court had granted an Order, on November 2, 1981. dismissing the action, as against the subject Defendants. CA App. 359, R 159. This was the first notice of said Order, received by the Petitioner; notwithstanding its being issued over eleven (11) months prior, during the former attorney's representation.

The Petitioner, in accordance to Rule 60(B) of 28 USC, immediately, on October 28, 1982, prepared and hand-delivered an Order to Show Cause, to the District Court judge, for his signature, directing the court to show cause, as to why the subject Defendants should not be reinstated, with supporting affidavit, whereupon the District Court judge signed the Order, after making substantial changes, in his own hand writing. CA App. 367-370, R 163. The court never acted on the Petitioner's motion, but rather, on December 6, 1982, rejected the Petitioner's assigning the Corporation's claims

to himself, and directed the Petitioner to hire new attorney to represent the Corporation, within forty five (45) days, or the complaint would be dismissed. The Petitioner appealed, the Court of Appeal affirmed, and the Petitioner hired new attorneys. CA App. 416(A), 511-520, R 168-169, 174, 176-178 and 181.

The District Court judge steadfastly refused to grant reconsideration or grant certification for appellate review, and refused to grant a requested hearing, as to why the former attorney dropped the subject Defendants, over the Petitioner's expressed objections, and filed the [unauthorized] "Second Amended Complaint". CA App. 362-369, 597-673, 870-875, 3(A)-10(A), R. 163-164, 206, 321, and R. 339, pages 30-33, 38-44, 63-66. Also see R. 340.

On January 23, 1983, Petitioner commenced the No. Two case and discovery, Pro se, by Summons, Complaint and written Interrogatories being filed and subsequently served. CA App. 417-507; R. 1-2, in No. Two case. The No. Two case was commenced for additional acts of discrimination and deprivations that occured in

1981, after the Petitioner's individual claims were dismissed and terminated in the No. One case, so as to avoid the statute of limitation's tolling, CA App. 416, 417-507, R 1-3, in No. Two case.

The District Court judge, [upon his own motion], dismissed the Petitioner's No. Two law suit, in its entirety, on February 12, 1985, without a trial upon the merits, predicated upon its heretofore described decisions, in the No. One case. CA App. 580-581, 25A-29A; R. 25 and 39 in No. Two case.

The Petitioner's attorneys appealed the District Court's determinations to the U.S. Court of Appeal, for the Second Circuit, which was [conditionally] withdrawn in the No. Two case. CA App. 982; R 43. The appeal in the No. One case was also withdrawn, upon advice of the Court of Appeal's staff counsel, due to improper certification. CA App. 1132-1135; R 261; Subsequently, on June 3, 1985, up to and including June 20, 1985, certain of the Defendants filed and served motions for Summary Judgement, and to dismiss the "Proposed Amended

and Supplemental Complaint", authorized by the Court on May 29, 1985. The Defendants based their motions upon the grounds that the District Court had dismissed the Petitioner's individual civil rights claims, in April of 1981, and upon the grounds that the District Court had dropped certain Defendants from the action, "without leave to further amend, and with prejudice", in November of 1981. CA App. 1079-1117, 1175-1178, R 245-258.

On August 5, 1985 the Petitioner filed a notice, discharging his attorney, as to representing himself, individually, and filed a notice of appearance, in the No. One case. CA App. 1180-1182, R 266-267, on August 6, 1985. Up to and including August 23, 1985, the Petitioner, Pro se, filed pleadings for multiple reliefs, and reconsideration, in the No. One case. CA App. 1184-1230, R 264, R 273, CA App. 1231-1288, R 285. However, the District Court judge, on September 16, 1985 refused to hear the Petitioner , in support of his position, but heard arguments of the Respondents' attorneys, and Co-Plaintiff's attorney. See AD 7, attached to the

Petitioner's Brief. Also see R. 339, 340, transcripts, in the No. One case.

Subsequently, the Petitioner reinstated the conditionally withdrawn appeal in the No. Two action, and thereafter filed and served a motion , seeking the District Court judge's disqualification, under the Reasonable Man standard. §455 of 28 USC, CA App. 1279-1284, 1287-1300, R 314, 316, 318, 340. See also R. 44 in the No. Two case. The motion for disqualification was denied on October 11, 1985. CA App. 1311-1314, R 320.

On October 15, 1985, the District Court entered a Order, in the No. One case, vacating its prior certification for individual standings,appellate review, and granting the Defendants, Summary Judgement, as to dismissing the Petitioner's individual claims, and as to dismissing the action, as against the dropped Defendants, and referred the case to the U.S. Magistrate, for further proceedings. Ca App. 3A-19A, R 321. The Petitioner Pro se, filed a notice of appeal, on October 22, 1985, from the District Court's Order. CA App. 1A, R 322. On appeal,

the actions were consolidated.

On appeal, certain of the Respondents' attorneys moved to dismiss the appeal, in the No. One case, upon the grounds that the District Court Order was non-final, and the Court lacked jurisdiction. The Petitioner Pro se, filed an application for a Writ of Mandamus Review, and a motion for permission to amend the complaint, pursuant to §1653 of 28 USC. See CA - docket sheet entries.

On January 23, 1986, the U.S. Court of Appeal, dismissed the appeal, and denied the Petitioner's application for Writ of Mandamus, in the No. One case, and on April 16, 1986, denied a timely petition for rehearing, and refused to entertain the Petitioner's motion for permission to file an amended complaint.

On May 8, 1986, the U.S. Court of Appeals affirmed the District Court's determination, in the No. Two case, citing Watson v. Jones; 13 Wall, 679, 715 (1871); as authority.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning federal, constitutional rights and due

process violations, as a result of decisions rendered by the courts below in the No. One case. As a result, the Petitioner has been denied his individual rights to seek redress in the U.S. federal courts.

The unprecedented rulings below seriously overlooked this court's decisions in Armstrong v. Manzo, 380, U.S. 545 (1965). Furthermore, the Court of Appeal's conclusion to dismiss the appeal, and deny application for Writ of Mandamus, without reviewing due process isues raised in the District Court, and in the Court of Appeal is patently inconsistent with the decisions of this and other courts. Armstrong v. Manzo; 380, U.S. 545 (1965) Schroeder v. City of New York, 371, U.S. 208; New York v. New York, N.H. & H.R., CO., 344, U.S. 293; Walker v. Hutchinson City, 352, U.S. 112; Boddie v. Connecticut, 401,U.S. at 374, (1971); Burtniers v. City of New York, 716, F 2d 986, (1983); Grannis v. Ordean, 234, U.S. 385, (1914); Miller v. Stanmore, 636, F 2d 986, (1981).

The Record simply shows that before the Order and [Judgement] were entered, dismissing the

Petitioner's individual claims, there was absolutely no motion filed, or pending, nor was there any hearing held, addressing the Petitioner's individual claims alleged in the [authorized] "Amended and Supplemental Complaint", dated March 30, and filed on April 3, 1981. Armstrong v. Manzo, 380, U.S. 545, (1965).

Futhermore, the issues surrounding the dropped Defendants, after the Petitioner's claims were dismissed from the case, authorized review by the U.S. Court of Appeal, wherein due process violations were raised and apparent, on the facts. Wood v. Georgia, 450 U.S. 261, (1981); Cuyler v. Sullivan, 446, U.S. 335, (1980); Holloway v. Arkansas, 435, U.S. 475, (1978).

Indeed the District Court judge, in this very case; Jones v. N.F.T.A., et al, held, on May 29, 1985, in an unreported decision, that only the complaint authorized by the court may be considered, and that any other version of such a complaint "must be deemed a nullity". See App. 1070-72, R. 244.

The dismissal of the case, as against the

subject Defendants, for the non-appearance of a former attorney was a default, and was timely and repeatedly challenged, upon the Petitioner's being notified of such. See 28 USC Rule 60(B). Hutton, et al v. Fisher, et al, 359, F 2d 913 (1966); C F Elias v. Pitucci, 13 FRD 13 (E.D. PA. 1952); Rogers v. Arzt, 1 FRD, 581, (S.D.N.Y. 1941); Bass v. Hoagland, 172, F 2d, 205, (5th Cir. 1949); Cinque v. Langton, 8 F.R. Serv., 55B, 224, (ED N.Y. 1944).

Furthermore, it has been held that dismissal, with prejudice of a party's complaint is a harsh sanction to be resorted to, only in extreme cases, and that dismissal with prejudice cannot be imposed as a mere punishment. See Societe, et al v. Rodgers, 357, U.S. 197, 206, (1958); Harris v. Cuyler, 664, F 2d 388, 390, (3rd Cir. 1981); Jones v. Smith, 99 FRD 4 (M D 1983).

Moreover, the decisions of the Court of Appeal to dismiss the Petitioner's Pro se appeal and deny application for Writ of Mandamus, based upon the grounds that it lacked jurisdiction,

is patently inconsistent with the decisions in Southern Pacific Terminal Co., v. I.C.C., 219, U.S. 498, 515, (1911), and matter of Vuitton Et Fils SA., 606, F 2d 1 (2nd Cir. 1979).

Clearly the District Court's orders were final orders, and the Court of Appeal had jurisdiction to review, under Sections 1291 and 1651 of 28 USC, without certification under Section 1292 (B) of 28 USC.; City of Santa Clara, Cal., v. Andrus, 502 F 2d at 665, (1978); Vuitton Et Fils SA., 606, F 2d (2nd Cir. 1979).

In the matter of Vuitton, 606 F 2d 1, (1979); the Court of Appeal for the Second Circuit assumed jurisdiction upon an application for Writ of Mandamus, under 28 USC §1651(A), in the absence of certification, under 28 USC §1292(B); due to extraordinary circumstances existing, as here.

It is plain, on the face of the Record, that the Petitioner, who is a Negro (Black) and a member of the protected class, under statute, has standings to pursue his claims [Pro se]. Flast v. Cohen, 392, U.S. 83 (1968); Haines v. Kerner, 404, U.s. 519 (1972); Cannon v.

University of Chicago, 441, U.S. 677, (1979). Review of these decisions is essential.

1. A. In Flast v. Cohen, Supra., this court held:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."
>
> "Questions of standing, unlike "legal interest" tests concerns apart from "case" or controversy tests; "questions whether interest sought to be protected by Complainant is arguably within zone of interest to be protected or regulated by statute or constitutional guarantee in question."
>
> "In terms of Article III Limitations of Federal Court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated, will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

B. This court held, in Cannon v. University of Chicago, 441, U.S. 677, that:

> "Title IX was patterned after Title VI of the Civil Rights Act of 1964, and the drafters of Title IX especially assumed that it would be interpreted and enforced in the same manner as Title VI, which has already been construed by federal courts, as creating a private remedy, when Title IX was enacted".

See also Association of Data Processing Serv. Org., Inc. v. Camp, 379, U.S. 150, (1970); Traf-

ficante v. Metropolitan Life Ins., 409, U.S. 205, (1972); University of California v. Bakke, 438, U.S. 265, (1978); Bird v. Electrical Workers Local No. 24, 7 E.P.D., 7472, (1974); Howard Sect. Ser. v. Johns Hopkins, 516, F. Supp. 508 (1981); Minority Emp. V. Tenn. Dept. Employ. Sec., 573, F. Supp. 1346, (1983); Schlafly v. Volpe, 7 E.P.A., 7379, (1974); Gladstone Realtors v. Village of Bellwood, 441, U.S. 91, 111, (1979); Warth v. Seldin, 422, U.S. at 501.

C. In Haines v. Kerner, et al, 404, U.S., 519 (1972), this Court, in reversing that case, wrote:

> "We cannot say with assurance, that under the allegations of the Pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears beyond doubt, that the Plaintiff can prove no set of facts in support of his claims, which would entitle him to relief". Conley v. Gibson, 355, U.S. 41, 45-46, (1957); See Dieguardi v. Durning, 139 F 2d 774, (CA 2 1944).

Thus, it was concluded that the Petitioner was entitled to an opportunity to offer proof. This Court directed, in Conley v. Gibson, that all the rule requires is:

"a short and plain statement of the claims and that the Federal Rules reject the approach that pleadings are a game of skills, in which one misstep by counsel may be decisive to the outcome, and accepts the principal that purpose of pleadings is to facilitate a proper decision, on the merits."

Furthermore, the District Court was "under obligation", under Rule 19A of 28 USC, "to ensure that technical problems of pleadings, practices, and joinder do not prevent prosecution of Pro se civil rights actions; including duty to inform Pro se complainant of his rights to join officials, who are not named in the complaint, and to direct or permit joinder." See Eakins v. Reed, 710, F 2d, 184, (1983).

The Petitioner respectfully submits that the decisions now before this Court, present grave challenges, as to offend the due process clauses of the Fifth and Fourteenth Amendments, as construed in applicable decisions of this and other courts. Armstrong v. Manzo, 380, U.S. 545, (1965)

Pending disposition of the Petitioner Pro se's petition for rehearing, in the Court of Appeals, the Petitioner caused an application to be filed, together with a Memorandum of Law, on March

12, 1986, seeking persmision to amend complaints, pursuant to the provisions under 28 USC §1653, in an attempt to cure defects and plead the facts, with specificity, in the complaints. See motion and exhibits filed with CA on March 12, 1986, under docket sheet no. 85-7194; however the court denied the petition for rehearing on April 16, 1986, without considering the Petitioner's application to amend complaints.

Section 1653 of 28 USC authorizes the Court of Appeals, within its discretion, to allow amendment of civil rights complaints; Rotolo v. Borough of Charlerio, et al, 532, F 2d 920 (3rd Cir. 1976). The court held in Rotolo, that civil rights suits were appropriate for application of statute, which expressly allows for amendment of defects to jurisdictional allegations, 532, F 2d at 922. Also see Local No. 1 (ACA) v. Intern. Bor., 614, F 2d 846, (1980)..

Thus, this case, like Rotolo v. Borough of Charleroi, et al, 532, F 2d 970, should have been decided on the same principles as applied in that case.

The Court of Appeal affirmed the District Court's decision and final judgement, in the No. Two case, on May 8, 1986, which dismissed the case in its entirety, without allowing discovery, nor a trial, predicated upon the heretofore described decisions in the No. One case; citing Watson v. Jones, 13, Wall 679, 715 (1871), Fed. R. Civ. R. 1, and Fed. R. Civ. P. 42(A). CA App. 547-551,560-564, 597-673 R 189, 190, 196 and 197. Also see November 16, 1984, District Court docket notation in the No. Two case.

This decision conflicts drastically with more recent decisions of this and other courts, in that the District court invoked the "bar" doctrine, which is patently inconsistent with the decisions in Compagnine DesBauxites v. L'Union, 723, F 2d 357, (1983); Etten v. Lovell Manu. Co., 2255, F 2d 844, 846, (3rd Cir. 1955); Thomas v. Furness, (Pacific) Ltd., 171, F 2d 434, 435 (9th Cir. 1948); Bucholz v. Hutton, 153, F Supp., 62, 68-69 (D Mont. 1957); Radakovich v. Weisman, 241, PA Supper 35, 359, A 2d 426, 430-431, (1976); C F Orange Thea. Corp.

v. Rayrer STZ Amusement Corp., 139 F 2d, 871, 875, (3rd Cir.) 322, U.S. 740 (1944).

The Petitioner respectfully submits that in accordance to these decisions, the Court of Appeal erred, in affirming the District Court's decision to dismiss the No. Two case, in its entirety. Compagnine DesBauxites v. L'Union, 723, F 2d 357 (1983).

Moreover, it has been held that the District Court erred in granting Defendants'Summary Judgement, while Interrogatories remained unanswered. Sames v. Cable 732, F 2d 49 (1984). See R 2, 28-31, in the No. Two case.

Furthermore, the Record clearly shows that the Petitioner, through his attorney, made the appropriate steps to consolidate the No. Two action with the No. One action, in accordance to 28 USC, Rule 42(A), CA App. 597-673, R. 196-197, in No. One case. United Air Lines, Inc., v. Weiner, 286, F 2d 302, (1962).

On appeal, the Petitioner strengthened his argument on this issue, in his Reply Brief, under Point IV, citing Magnavox Co., v. APF Electronics, 496, F. Supp. 29 (1980); Kenvin

v. Newburger, Loeb, & Co., 32 F.R.D., 473, (S.D.N.Y. 1965); 7 Wright and Miller, Fed. Prac. and Proc. §1353 at 270, (1972); Defigueiredo v. Trans World Airlines, Inc., 55 F.R.D. 44 (1971); Macallister v. Guterma, 263, F 2d 65, 68, (2nd Cir. 1958); Field v. Wolfson, et al, 41, F.R.D., 329 (S.D.N.Y. 1967), and Katz v. Realty Equities Corp., of New York, 521, F 2d, 1354, (2nd Cir. 1975).

The Court of Appeal, nonetheless, held that the District Court was correct in its decision to dismiss the Petitioner's No. Two action, because, in the court's view, the District Court had the power to do so; citing Watson v. Jones, 13, Wall, 679, 715, (1871), and Fed. 1, 28 USC, as authority. This is in direct conflict with Compagnine DesBauxites v. L'Union, 723, F 2d 357, (1983).

The Petitioner, while on appeal, filed an application for a Writ of Mandamus to issue, disqualifying the District Court judge, who presided over the No. One and No. Two cases, due to his bias, prejudice and vindictiveness against the Petitioner, and due to his denying the

Petitioner's motion for his disqualification, on October 11, 1985. See CA App. 1280-1314, R 314, 316-320, and 340.

The "Reasonable Person's" standard, under Section 455 28 USC, authorizes that recusal is appropriate where the "District Judge's impartiality might be questioned". Webbe v. McGhie Land Title Co., 549, F 2d, 1358, (10th Cir. 1977).

It was held in Webbe, that although the District Judge was performing a judicial function, his disqualification was warranted, under the Reasonable Persons standard, where bias, and prejudice were shown. Webbe v. McGhie Land Title Co., 549, F 2d 1358 (10th Cir. 1977). See also Mims v. Shapp, 541, F 2d 415, 417, (3rd Cir. 1976); United States v. Thompson, 453, F 2d (1973); United States v. Holland , 655, F 2d 44 (1981).

> "Since statute provides that a judge should disqualify himself in any proceeding, in which his impartiality might reasonably be questioned, the appearance of impartiality is virtually as important as the fact of impartiality", 28 USC §455. Webbe v. McGhie Land Title Co., 549, F 2d 1358 (10th Cir. 1977)

The District Court judge's judicial acts, in

this case, presents personal biased, prejudiced, and vindictive conduct against the Petitioner, as to call for his disqualification in these cases.

> "Vindictive conduct by persons with the awesome power of prosecutors and judges is unacceptable and requires control." Blackledge v. Perry, 417, U.S. 21, (1974); North Carolina v. Pearce, 395, U.S., 711, (1969); United States v. Andrews, 633, F 2d 449, (1980).

Most clearly, the District Court judge amplified his egregious bais, prejudice and vindictiveness against the Petitioner Pro se when he, on September 16, 1985 denied Petitioner Pro se to present argument, and on October 16, 1985 vacated his prior certification, granted on April 11, 1985, obviously because the Petitioner was seeking reconsideration on his individual behalf, Pro se. R 227, 228, 266-267, 269, 285, 321 and 340. Also see CA App. 1180-1193, 1198-1258.

CONCLUSION

This Petition for Writ of Certiorari, and Extraordinary Writ should be granted.

Respectfully submitted,

Walter L. Jones

WALTER L. JONES, Pro se
for the Petitioner

APPENDIX A

DECISIONS BELOW
(IN NO. ONE CASE)

[Here are set forth, sucessively, the opinions of the U. S. Court of Appeal for the Second Circuit, dismissing the appeal, and denying Mandamus, upon the grounds that it lacked jurisdiction, the orders and opinions of the District Court for the Western District of New York, Erie County, dismissing the Petitioner's individual civil rights' claims, upon the grounds that he lacks standing , and dismissing the case, as against certain Parties-Defendants, "without leave to further amend, and with prejudice", upon an appearance default committed by former attorney .]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WALTER L. JONES ET AL,
Plaintiffs-Appellants
-vs-
NIAGARA FRONTIER TRANSPORTATION AUTHORITY, ET AL.,
Defendants-Appellees

85-7836

NOTICE OF MOTIO

MOTION BY:(Name address and tel no. If law firm and of attorney in charge of case)

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, RICHARD P. WEISBECK, JR.
One Niagara square
Buffalo, New York 14202
(716) 849-1333

OPPOSING COUNSEL (nam address and tel no of law firm and attorney in charge of case)

WALTER L. JONES, PRO SE
204 Kings Highway,
Snyder, N.Y. 14226
(716) 839-2696 and
JOHN L. HARGRAVE, ESQ
482 Franklin Street
Buffalo, N.Y. 14202
(716) 884-2606

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPE

Has consent of opposing counsel;
A. been sought? ☐Y ☒N
B been obtained? ☐Y ☒N
Has service been affected? ☒Y ☐N
Is oral argument desired? ☐Y ☐N
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? ☐Y ☒N
B. by firm date of argument notice? ☐Y ☒N
C. if Yes, enter date

Has request for relief been made below? (see F.R.A.P. rule 8) ☐ Y

Would expedited appeal eliminate need for this motion?

If No., why not: ☐ Y

Will the parties agree to maintai the status quo until the motion is heard?

☐ Y

Judge of agency whose order is being appealed:
Honorable John T. Elfvin, U.S.D.C., W.D.N.Y.

Brief statment of the relief requested:
Motion to dismiss appeal filed ing the District Court on October 22, 1985 because the order appealed from is non-final and the Court of Appeals lacks jurisdiction to entertain it.

Complete Page 2 of This Form

By:(Signature of attorney) Appearing for: (Name of Party) Appellant or Petit ☐Plaintiff ☐Defend
See attached client list Appellee or Respond ☐Plaintiff ☒Defend

12/18/85
Date

Richard P. Weisbeck, Jr.

ORDER

IT IS HEREBY ORDERED that the motion be and is hereby granted

J. Edward Lumbard, U.S.C.J.
Thomas J. Meskill, U.S.C.J.
Lawrence W. Pierce, U.S.C.J.

1/23/86
Date

PRO SE
1/21
WDNY
80CV1075
ELFVIN

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

MANDATE

At a Stated Term of the United States Court of Appeals, for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 23rd day of January, One thousand nine hundred and eighty-six.

In Re: Walter L. Jones,
Petitioner,

A motion having made herein by Petitioner pro se for Writ of Mandamus

Upon consideration therof, it is
Ordered that said motion be and it hereby is DENIED.

J. Edward Lumbard, U.S.C.J.

Thomas J. Meskill, U.S.C.J.

Lawrence W. Pierce, U.S.C.J.
Circuit Judges

TJM JEL LWP

A TRUE COPY
ELAIN B. GOLDSMITH

Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Apeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of April, one thousand nine hundred and eighty-six

FILED

APR 16, 1986

WALTER L. JONES,
Plaintiff-Appellant,

v.

NIAGARA FRONTIER TRANSPORTATION AUTHORITY, (NFTA), et al,
Defendants-Appellees.

Docket No 85-7836

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant Walter L. Jones, pro se.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Walter L. Jones & 1

Civ-80-1075E

-vs-

Niagara Frontier Transportation Authority et al

SIR: Take note that Judgement & ORDER was duly granted and entered in the above entitled action, on the 22nd day of April 1981

DATED: Buffalo New York
April 22, 1981

John K. Adams, Clerk
U.S. District Court
602 U.S. Courthouse
Buffalo, New York 14202

TO: Walter L. Jones Pro se
Hodgson, Russ, Andrews, Woods & Goodyear
Stuart M. Pohl, Esq.
Robert E. Pearman, Esq.
Douglas S. Cream, Esq.
Joseph L. Randazzo, Esq.
James W. Gresens, Esq.
United States Attorney

JUDGEMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

Walter L. Jones
Walter L. Jones development Corp.,

CIVIL ACTION FILE NO. 80-1075

vs.

JUDGEMENT

Niagara Frontier Transportation
Authority, et al.

Ths action came on for trial (hearing) before the Court, Honorable John T. Elfvin, United States District judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the cause and causes of action asserted in this lawsuit by Walter L. Jones on his individual behalf are dismissed.

Dated at Buffalo, New York this 22nd day of April, 1981.

Clerk of Court
John K. Adams

UNITED STATES DISTRICT COURT
WESTERN DISTRICT COURT OF NEW YORK

CIV-80-1075E

WALTER L. JONES and WALTER L. JONES DEVELOPMENT CORPORATION, INC.,
Plaintiffs,

vs.

MEMORANDUM and ORDER

NIAGARA FRONTIER TRANSPORTATION AUTHORITY, (NFTA), URBAN MASS TRANSPORTATION ADMINISTRATION,(UMTA), NEW YORK STATE DEPARTMENT OF TRANS-PORTATION (NYS DOT), SIEGFRIED CONSTRUCTION CO.,INC., SLATTERY ASSOCIATES, INC., HERBERT F. DARLING, INC., JOHN W. COWPER CO., INC., FRUIN COLNON/TRAYLOR BROTHERS/& ONYX EQUIPMENT COMPANY, NELSON PETERS ASSOCIATES, CONSTRUCTION INDUSTRY EMPLOYERS ASSOCIATION, BUILDING TRADES COUNCIL OF BUFFALO AND VICINITY, LABORERS LOCAL UNION NO. 210, IRONWORKERS LOCAL UNION NO. 6, CEMENT MASONS' LOCAL NO. 511, CARPENTERS DISTRICT COUNCIL, OPERATING ENGINEERS LOCAL UNION NO. 17, 17A, 17B, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, PLUMBING CONTRACTORS OF ERIE COUNTY, N.Y., INC.,

Defendants.

This action involves the construction of the City of Buffalo's Light Rail Rapid Transit System ("the LRRT") which has been underway since 1979. Plaintiffs in this action are Walter L. Jones Development Corporation, Inc., a small minority non-union prime contracting firm located in Buffalo, and Walter L. Jones, owner and president of the Walter L. Jones Development Corporation,

Inc. (hereinafter "the Corporation"). Defendants are the Niagara Frontier Transportation Authority ("the NFTA"), the Urban Mass Transportation Administration ("the UMTA"), New York's Department of Transportation ("the DOT"), a minority consultant firm, several contracting and construction firms, and several unions and employer associations.[1] In essence, plaintiffs allege that defendants acted jointly and individually to deprive the Corporation of its rights, as a minority prime contracting firm, to participate in the building of the LRRT.

The issue now before the court is plaintiffs' motion for a preliminary injunction to halt all current construction and to permit the Corporation to carry the remaining work. Defendants oppose plaintiffs' motion for basically three reasons: that Jones has no standing as an individual to press the allegations in the Amended Complaint; that the Corporation cannot be

---

[1] Plaintiffs' original Complaint was against only the NFTA, the UMTA, and the DOT. I granted plaintiffs permission to amend their Complaint when the parties appeared before me February 9, 1981. The other fifteen defendants were added in plaintiffs' Amended Complaint.

represented by Jones, who is not an attorney; and that plaintiffs have failed to pass the test required for preliminary relief. I find that all three arguments urged by defendants are valid.

Standing of Walter L. Jones

Article III of the Constitution of the United States requires that a party must have a sufficient stake in the controversy in order to pursue his or her or its claims in federal court. Sierra Club v. Morton, 405 U.S. 727 (1977). To meet this constitutional standing test, a plaintiff must show that he or she or it has sustained some direct injury as a result of the defendants' alleged conduct. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); Goldberg v. Weinberger, 546 F. 2d 477, 479 n.3 (2nd Cir. 1976), cert. denied, 431 U.S. 937 (1977); Brashich v. Port Authority of New York, 484 F. Supp. 697, 701-03 (S.D.N.Y. 1979), aff'd,628 F. 2d 1344 (2d Cir. 1980)

Jones has failed entirely to demonstrate the requisite injury to establish his constitutional standing to pursue this case as a plaintiff.

Although this lawsuit has been pending for only a short length of time, plaintiffs have submitted voluminous and detailed papers. A thorough review of them reveals that, notwithstanding the many factual averments, there is no claim or indication that any of the defendants acted against Jones in his individual capacity. According to plaintiffs' own pleadings, all of defendants' purported actions were taken against the Corporation, not against Jones personally. Similiarly, the alleged injuries--to wit, financial losses resultant from the Corporation's nonparticipation in the construction project and public defamation[2] --were inflicted solely upon the Corporation, not upon Jones as an individual.

It certainly understandable that as owner and president of the Corporation, Jones feels personally angered and aggrieved by defendants' allegedly discriminatory conspiracy to deprive "his" Corporation of a construction contract. Such

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[2] Public defamation of the Corporation was alleged an an injury by plaintiffs at oral argument March 2, 1981.

feelings, however, do not translate into the constitutional standing he needs to be entitled to sue, on behalf of either himself or the Corporation, these defendants for their alleged actions. See, Warth v. Sendin, 422 U.S. 490, 508-10 (1975); Chenkin v. Bellevue Hospital Center, New York City Health and Hospitals Corporation, 479 F. Supp. 207, 216 (S.D.N.Y. 1979).

Accordingly, any claim asserted by Jones as an individual must be dismissed at this time.

Representation of the Corporation

When plaintiffs initiated this lawsuit Jones represented both himself (as a pro se plaintiff) and the Corporation. As an affirmative defense, defendants have asserted that the Corporation was improperly before the court because a corporate entity must be represented by an attorney to maintain a federal lawsuit.

At oral argument March 2, 1981, plaintiffs told the court that the Corporation would henceforth be represented by attorney John L. Hargrave, Esq. Such a statement would ostensibly render the inadequate corporate representation defense moot (at least from that point forward).

Subsequent to oral argument, however, additional papers have been filed by Plaintiffs, some of which have been signed only by "Walter L. Jones, Attorney Pro se for Walter L. Jones, personally, and as owner of Walter L. Jones Development Corporation, Inc." See, for example, Plaintiffs' Response and Request for Clarification to Answers Submitted by Defendant NFTA, to Plaintiffs [sic] First Interrogatories, filed March 25, 1981. For this reason, it is necessary to confront the issue posed by defendants.

Under federal law, a corporation can be represented in court only by an attorney. The theory behind this principle is that, as an artificially created entity, a corporation can act only through its agents. For purposes of a lawsuit, the proper agent must be a properly admitted attorney of record. S.E.C. v. Research Automation Corp., 585 F. 2d 31, 33, n.2 (2d Cir. 1978); Phillips v. Tobin, 548 F. 2d 408, 411 (2d Cir. 1976); Securities & Exch. Com'n. v. Research Automation Corp., 521 F. 2d 585, 589 (2d Cir. 1975); Jackson v. Statler Foundation, 496 F. 2d 623, 626 (2d Cir. 1974) ("[W]e note that

if appellant's foundation is incorporated it may only appear with counsel."); [3] Shapiro, Bernstein & Co., Inc., v. Continental Record Co., Inc., 386 F 2d 426, 427 (2d Cir. 1967) (per curium reversal) ("[I]t is settled law that a corporation cannot appear other than by its attorney").

For this reason, the Corporation can be represented only by properly admitted counsel authorized to do so by the Corporation. Mr. Hargrave would be such if the Corporation has retained him and if he acts as an attorney for such corporate client. [4]

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[3] This controlling ruling is neither cited nor discussed in Matter of Holliday's Tax Service, Inc., 417 F. Supp. 182 (E.D.N.Y. 1976), wherein qualified permission for a small closely-held corporation to proceed in bankruptcy represented by its sole shareholder who was not an attorney was granted. The decision was affirmed on appeal sub nom. Holliday's Tax Services Inc., v. Hauptman, 614 F. 2d 1287 (2d Cir. 1979) but without written opinion and expressly without precedential value. It has been characterized as unique and polemical. In re Las Colinas Dev. Corp., 585 F. 2d 7, 11 (1st Cir. 1978).

[4] Plaintiffs are well-advised to take note of the requirements of Rule 11, Federal Rules of Civil Procedure.

Preliminary Injunction Test

Defendants uniformly insist that plaintiffs have failed to meet the stringent preconditions for preliminary relief. A preliminary injunction is a drastic and extraordinary remedy and should not be granted absent a clear and convincing showing by the moving party. Yakus v. United States, 321 U.S. 414 (1944). In this circuit, a party must demonstrate:

> "possible irreparable injury and either (1) probable sucess on the merits or (2) sufficiently serious questions goint to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief."

Caulfield v. Board of Education of the City of New York, 583 F. 2d 605, 610 (2d Cir. 1978) (emphasis in original). I am satisfied that the Corporation has not met its heavy burden.

A. Irreparable Harm

Plaintiffs assert that the Corporation's irreparable injuries amount to a continuing financial loss of approximately $120,000.00 per day. According to plaintiffs, this figure is based on the various contract bids the Corporation unsuccessfully submitted.

As the UMTA accurately observes, the Corporation's alleged monetary loss is merely speculative and is unsubstantiated. In light of the many factual contentions disputed by the parties, plaintiffs have plainly failed to demonstrate that, even if defendants acted wrongly against the Corporation in some respects, it would have been entitled to all or any of the contested contracts.

Futhermore, by plaintiffs' own assertions, the alleged irreparable injuries are in the nature of monetary damages for past contracts already awarded to other contractors. Plaintiffs have failed to make any showing that money damages would be a sufficient remedy should the Corporation ultimately prevail. Such failure alone is a proper basis for denial of injunctive relief. Thompson v. New York Central Railroad Company, 361 F. 2d 137, 145-46 (2d Cir. 1966); Copylease Corporation of America v. Memorax Corporation, 397 F. Supp. 853, 855 (S.D.N.Y. 1975).

B. Likelihood of Sucess on the Merits

Plaintiffs have likewise failed to show that the Corporation is likely to prevail in its

lawsuit. As the NFTA points out, plaintiffs have pleaded a great number of facts against a great number of defendants. Many of these facts are convincingly controverted in answers and affidavits submitted by defendants.

In this case, the facts as alleged by plaintiffs are integral to their case. If events did not occur the way they claim, there is no reason to presume that they would be entitled to any relief. The existence of significant factual conflicts in this case raises sufficient doubt about the Corporation's likelihood of success that preliminary relief should not be granted. American Visuals Corporation v. Holland, 219 F. 2d 223 (2d Cir. 1955); Eastin-Phelan Corporation v. Hal Roach Studios, 350 F. Supp. 1328, 1332 (S.D.N.Y. 1977); see, Wright & Miller, Federal Practice & Procedure §2948 at 455-56 (1973).

C. Balance of Hardships

The alternative to the "likelihood of success on the merits" test requires, inter alia, a showing that the balance of hardships tips decidedly toward the party requesting preliminary

relief. At oral argument, defendants demonstrated, again convincingly, that the balance of hardships falls overwhelmingly upon them (and the public) rather than upon the Corporation.

At oral argument March 2, 1981, defendants one by one described the considerable extent to which the contracts have already been carried out, the amount of work which has already been finished, and the large number of construction workers and other employees who would be severely and adversely affected by any injunction to halt the work presently underway. If defendants eventually prevail, the additional costs resulting from the court-imposed delay would be unmeasurably burdensome.

Plaintiffs reply that no delay need arise if the court were to permit them to replace the current workforce with a workforce of their own. Plaintiffs have made no showing, however, that they are in a position to do so with the immediacy demanded by the circumstances. To do so would be impossible for all practical purposes. It is therefore obvious that a preliminary injunction in favor of the Corporation would wreak

much more harm than good on the LRRT, which is well on its way to completion.

It is therefore hereby

ORDERED that the cause and causes of action asserted in this lawsuit by Walter L. Jones on his individual behalf are dismissed; and it is further hereby

ORDERED that plaintiff Walter L. Jones Development Corporation, Inc., may be represented in this lawsuit only by properly admitted counsel;[5] any pleadings and other papers and arguments submitted by the Corporation after this Order is entered must be in accordance with this Order; and it is further hereby

ORDERED that the Corporation's motion for a preliminary injunction is denied.

U.S.D.J.

Dated: Buffalo, N.Y.
April 17, 1981

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5 Whether the Amended Complaint sets forth a tenable cause of action is not now decided.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES,
WALTER L. JONES DEVELOPMENT CORP.

-V-

CIVIL 80-1075E

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
et al,

SIR: take notice that an ORDER was duly granted and entered in the above action, on the 8th day of Oct. 1981

DATED: Buffalo, New York

October 8, 1981

John K. Adams, Clerk
U.S. District Court
604 U.S. Courthouse
Buffalo, New York 14202

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES, WALTER L. JONES DEVELOPMENT CORPORATION,

Plaintiffs,

-vs-

CIV-80-1075E

NIAGARA FRONTIER TRANSPORTATION AUTHORITY, et al,

Defendants.

ORDER

Plaintiff corporation having filed an Amended Complaint August 7, 1981 in which the following individuals and entities, originally and in prior complaints named as parties defendant in this action, are not named as parties defendants:

New York State Department of Transportation,
Victor Scaravilli and S & M McHugh Kenny,
Oscar Rayford & Universal Supply Equipment & Construction Co.,
John M. Fuhrmann & Construction Industry Employers Association,
Edward Cole & Tresco Distributions,
Carmen A. Gallo & Amiga Construction,
Emanuel Humes & Humes Industrial Electric,
Emanuel Humes & Humes Contracting Co.,
Joseph Myles & Trash land Trucking,
Robert Chester & Keystone Steel,
Robert L. Pitts & P & S Supply,
James Lyles & L & W Concrete,
DeVilus Gray & Aftco International Trading Company,
Paul Harrison & Downtown Dump Truck Service,
Dean Williams & Native American Construction Co.,
William Taborn & Nelson Peters, Associates,
Donald J. Blair & building Trades Council of Buffalo & Vicinity,

Ronald M. Fino, & Laborers Local Union No. 210
Joseph F. Colern & Michael Fitzpatrick, Iron Workers Local Union No. 6,
Leonard S. Coniglio & Cement Mason's Local Union No. 511,
Herman F. Bodewes & Carpenters District Council
Leo Hopkins & Operating Engineers Local Union Nos. 17, 17A, 17B,
Lawrence J. Stroh & National Electrical Contractors Association,
Plumbing Contractors Association of Erie County N.Y., Inc.,

it is hereby

ORDERED that Plaintiff corporation show cause October 19, 1981 at 9:00 in Part II of this Court why these individuals and entities should not be dropped from this lawsuit pursuant to Fed. R. Civ. P. rule 21 and this action be deemed dismissed as to each of them.

JOHN T. ELFVIN
United States District Judge

Dated: Buffalo, N.Y.
October 8, 1981

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Walter L. Jones Development Corp.

-vs- Civil 80-1075E

Niagara Frontier Transportation Authority, et al

SIR: Take notice that an ORDER was duly granted and entered in the above entitled action, on the 3rd day of November, 1981

DATED: Buffalo, New York

November 3, 1981

John K. Adams, Clerk
U.S. District Court
604 U.S. Courthouse
Buffalo, New York 14202

TO: Charles L. Davis, Esq.
Brown, Kelly, Turner, Hassett & Leach
Damon, Morey, Sawyer & Moot
John P. Bartolomei, Esq.
Timothy J. Toohey, Esq.
Douglas S. Cream, Asst. Atty General
John Jenny, Esq.
C. Donald O'Connor, AUSA
E. Joseph Giroux, Esq.
Hodgson, Russ, Andrews, Woods, & Goodyear
Stuart M. Pohl, Esq.
Joseph L. Randazzo, Esq.
James W. Gresens, Esq.
John E. Runals, Esq.
Roy W. King, Esq.
Robert Pearman, Esq

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES, WALTER L. JONES DEVELOPMENT CORPORATION
Plaintiffs,

vs

NIAGARA FRONTIER TRANSPORTATION AUTHORITY, et al,
Defendants.

ORDER

Civ-80-1075E

This matter having come on to be heard on October 19, 1981, upon this Court's own Order to Show Cause dated October 8, 1981, why the following parties defendants:

New York State Department of Transportation
Victor Scaravilli and S & M/McHugh/Kenny
Oscar Rayford & Universal Supply Equipment & Construction Co.
John M. Fuhrmann & Construction Industry Employers Association
Edward Cole & Tresco Distributions
Carmen A. Gallo & Amiga Construction
Emanual Humes & Humes Industrial Electric
Emanual Humes & Humes Contracting Co.
Joseph Myles & trash Land Trucking
Robert Chester & Keystone Steel
Robert L. Pitts & P & S Supply
James Lyles & L & W Concrete
DeVilus Gray & Aftco International Trading Company
Paul Harrison & Downtown Dump Truck Service
Dean Williams & Native America Construction Co.
William Taborn & Nelson, Peters Associates
Donald J. Blair & building Trades Council of Buffalo & Vicinity
Ronald M. Fino & Laborers Local Union No. 210
Joseph F. Colern & Michael Fitzpatrick, Iron

Workers Local Union No. 6
Leonard S. Coniglio & Cement Mason's Local Union No. 511
Herman F. Bodewes & Carpenters District Council
Leo Hopkins & Operating Engineers Local Union Nos. 17, 17A, 17B
Lawrence J. Stroh & National Electrical Contractors Association
Plumbing Contractors Association of Erie County, N.Y., Inc.

should not be dropped pursuant to Fed. R. Civ. R. 21, because the above-named parties defendants are not named in the "Second Amended Complaint" dated August 14, 1981, presently before this Court and no one appearing for plaintiffs in opposition to this motion and inasmuch as the above-named parties defendants had filed motions to dismiss plaintiffs' prior Amended and Supplemental Complaint dated March 30, 1981, it is hereby

ORDERED, that the following named parties defendants,

New York State Department of Transportation
Victor Scaravilli and S & M/McHugh/Kenny
Oscar Rayford & Universal Supply Equipment & Construction Co.
John M. Fuhrmann & Construction Industry Employers Association
Edward Cole & Tresco Distributions
Carmen A. Gallo & Amiga Construction
Emanual Humes & Humes Industrial Electric
Emanual Humes & Humes Contracting Co.
Joseph Myles & trash Land Trucking
Robert Chester & Keystone Steel

Robert L. Pitts & P & S Supply
James Lyles & L & W Concrete
DeVilus Gray & Aftco International Trading Company
Paul Harrison & Downtown Dump Truck Service
Dean Williams & Native America Construction Co.
William Taborn & Nelson, Peters Associates
Donald J. Blair & building Trades Council of Buffalo & Vicinity
Ronald M. Fino & Laborers Local Union No. 210
Joseph F. Colern & Michael Fitzpatrick, Iron Workers Local Union No. 6
Leonard S. Coniglio & Cement Mason's Local Union No. 511
Herman F. Bodewes & Carpenters District Council
Leo Hopkins & Operating Engineers Local Union Nos. 17, 17A, 17B
Lawrence J. Stroh & National Electrical Contractors Association
Plumbing Contractors Association of Erie County, N.Y., Inc.

are dropped without leave to further amend and with prejudice as to the above-named parties defendants.

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John T. Elfvin
United States District Court

Dated: Buffalo, New York
November 2, 1981

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES,

Plaintiff,

-v-

CIVIL 80-1075E

NIAGARA FRONTIER TRANSPORTATION AUTHORITY, et al.,

Defendants.

SIR/MADAM: Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 12th day of February, and entered in the office of the Clerk of the United States District Court, Western District of New York, on the 12th day of February.

Dated: Buffalo, New York
Feb. 12, 1985

JOHN K. ADAMS, CLERK
U.S. District Court
Western District of New York

U.S. Courthouse
Buffalo, New York 14202

cc: Walter L. Jones
Barbara M. Sims, Esq.
John Hargrave, Esq.
John Randazzo, Esq.
C. Donald O'Connor, AUSA
Brown, Kelly, Turner, Hassett, Leach
Hodgson, Russ, Andrews, Woods, Goodyear
James Gresens, Esq.
Timothy Toohey, Esq.
E. Joseph Giroux, Jr., Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES, and
WALTER L. JONES DEVELOPMENT
CORPORATION, INC.,

Plaintiffs,

-vs-

NIAGARA FRONTIER TRANSPORTATION AUTHORITY (NFTA): JAMES H. WOLFORD; GEORGE L. WESSEL; RICHARD C. SOUTHARD; JOHN F. DOWNING; WILLIAM G. GISEL; JOHN F. KOPCZYNSKI; WILLIAM H. WENDEL; TED BECK; CHESTER R. HARDT; GEORGE J. TRIMPER; ALFONSO V. BELLANCA; JACK BAYER; WILLIAM E. STRAUB; JACOB F. SCHOELLKOPF V; JAMES E. KELLY; KENNETH G. KNIGHT; WILLIAM BULOW; URBAN MASS TRANSPORTATION ADMINISTRATION (UMTA); BROCK ADAMS; JOSE CAMALLONGA; RICHARD S. PAGE; HAROLD B. WILLIAMS; NEAL CAVANOUGH and SIEGFRIED CONSTRUCTION FO., INC.,; HERBERT F. DARLING and HERBERT F. DARLING, INC.; IRVING FRANCIS and JOHN W. COWPER CO. INC.; S.H. BARTHOLOMEW and FRUIN COLNON/ TOM TRAYLOR/TRAYLOR BROS.; WILLIAM STERLING and ONYX CONSTRUCTION & EQUIPMENT CO.,

Defendants.

CIV-80-1075E

MEMORANDUM AND ORDER

Considerable confusion has arisen regarding the procedural posture of this civil rights case[1] due, in part to a plethora of motions and proposed pleadings filed by plaintiff and to the coexist - ence of another case, Walter L. Jones, et al

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1 Further background information is supplied in previous decisions of the Court, partcularly Jones v. Niagara Frontier Transportation Authority, 524 F. Supp. 233 (W.D. N.Y. 1981).

v. Siegfried Construction Co., Inc., et al, CIV-83-86E, having substantial similarity to the instant lawsuit. Such other action has now been dismissed and plaintiff's recent motions to amend the instant Complaint so as to bring into this case virtually identical versions of claims which have been filed in CIV-83-86E and which had earlier been dismissed in the instant case have been rendered moot. Several other matters may also be disposed of at this time in an effort to allow the case to proceed in more orderly fashion.

Plaintiff has moved for reconsideration of this Court's November 2, 1981 Order herein dismissing the claims as to a number of defendants.[2]

Plaintiff also has persistently sought by various devices to reintroduce Walter L. Jones as an individual plaintiff in this case. Indeed it is the not so subtle behind the scenes manipulation of the case by Mr. Jones -- whose legal

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[2] Plaintiff brought a similar motion October 29, 1982 which this Court considered but did not decide given its disposition of other pending matters by a Memorandum and Order filed December 7, 1982.

acumen does not match his energy in pursuing these matters -- that has resulted in much of the delay and confusion that has occurred to date. As this Court previously noted in its April 22, 1981 Memorandum and Order dismissing those causes of action asserted in this lawsuit by Mr. Jones on his individual behalf and ordering that the Corporation be represented by properly admitted counsel:

> "It is certainly understandable that as owner and president of the Corporation, Jones feels personally angered and aggrieved by defendants' allegedly discriminatory conspiracy to deprive 'his' Corporation of a construction contract. Such feelings, however, do not translate into the constitutional standing he needs to be entitled to sue, on behalf of either himself or the Corporation, these defendants for their alleged actions. See Worth v. Seldin, 422 U.S. 490, 508-510 (1975); Chenkin v. Bellevue Hospital Center, New York City Health & Hospitals Corporation, 479 F. Supp. 207, 216 (S.D.N.Y. 1979)." Id at 4.

This Court in effect reaffirmed its conclusion in a somewhat different context by its Memorandum and Order of December 6, 1982, which was affirmed on appeal, 722 F. 2d 20 (2nd Cir. 1983). To the extent plaintiff's various motions can be

deemed a motion to reconsider this Court's April 22, 1981 decision, such matter has been amply considered and reconsidered and needs no further comment.

A brief review of events leading to the November 2, 1981 Order is appropriate. Plaintiff , having previously filed several amended complaints, moved July 1, 1981 for permission to file yet another. Its motion was granted July 13, 1981; the new amended pleading was filed August 7th and was followed by a "Second Amended Complaint" filed August 20, 1981. Because a number of individuals and entities named as parties defendant in the original and intervening complaints were no longer named in the August 7th and August 20th pleadings, this Court on October 8, 1981 issued an order that plaintiff show cause why such defendants should not be dropped from the lawsuit pursuant to Fed. R. Civ. P. rule 21. There having been no appearance or other opposition on behalf of plaintiff on the motion's return date and the defendants in question having filed motions to dismiss plaintiff's prior Amended and Supplemental Complaint

dated March 30, 1981, this Court dismissed plaintiff's claims as to such defendants. Plaintiff now asserts that the dropping of those defendents from the August 7th and August 20th complaints was an unauthorized act by plaintiff's then attorney and that such action was taken over Mr. Jones's objections. Plaintiff apparently acknowledges that the dropping of the defendants in question represented a strategic determination by its attorney that such defendants were not material to the present action (see Plaintiff's Memorandum of November 14, 1984 at p. 9). Plaintiff merely asserts that Mr. Jones did not agree with that decision, ibid., and that such defendants are in fact material. There is no question that plaintiff's said attorney had received the Order to Show Cause. Inasmuch as the dismissal of those certain defendants from this matter had resulted from a considered judgement on the part of competent counsel for plaintiff, there is no reason to vacate the November 2, 1981 Order.

Also presently outstanding are motions by several other defendnts to dismiss the August 20,

1981 complaint (which is the currently viable complaint in this action). Because of the procedural confusion in this case and the possibility that such motions may have become stale given intervening circumstances, such motions will be deemed dismissed without prejudice and all defendants in this action shall have twenty (20) days to respond to or move against the August 20, 1981 complaint. Such motion or motions may incorporate previous memorandua and filings, providing specific reference is made thereto.

Finally plaintiff has moved to compel answers to its supplemental interrogatories. Defendants shall have thirty (30) days from the entry of this Memorandum and Order to respond to such interrogatories as may have been served upon them.

Accordingly, it is hereby

ORDERED that plaintiff's motions to vacate orders of this Court issued November 2, 1981 and April 22, 1981 are denied; and it is hereby further

ORDERED that defendants' motions to dismiss the August 20, 1981 complaint are denied without

prejudice and that each defendant shall have twenty (20) days from the entry of this Memorandum and Order to answer or move against said complaint; and it is hereby further

ORDERED that plaintiff's motion to compel answers to its interrogatories is dismissed without prejudice to such motion being brought within thirty (30) days of the entry of this Memorandum and Order.

Dated: Buffalo, N. Y.
February 12, 1985

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U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES DEVELOPMENT CORPORATION,
Plaintiff,

-v-

CIVIL 80-1075

NIAGARA FRONTIER TRANSPORTATION AUTHORITY, et. al,
Defendant.

SIR/MADAM: Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 11th day of October, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 11th day of October.

Dated: Buffalo, New York
October 11, 1985

JOHN K. ADAMS, CLERK
United States District Court
Western District of New York
U. S. Courthouse
Buffalo, New York 14202

cc: See Attached List

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES and
WALTER L. JONES DEVELOPMENT CORPORATION, INC.,
Plaintiffs,

-vs-

NIAGARA FRONTIER TRANSPORTATION AUTHORITY (NFTA): JAMES H. WOLFORD; GEORGE L. WESSEL; RICHARD C. SOUTHARD; JOHN F. DOWNING; WILLIAM G. GISEL; JOHN F. KOPCZYNSKI; WILLIAM H. WENDEL; TED BECK; CHESTER R. HARDT; GEORGE J. TRIMPER; ALFONSO V. BELLANCA; JACK BAYER; WILLIAM E. STRAUB; JACOB F. SCHOELLKOPF V; JAMES E. KELLY; KENNETH G. KNIGHT; WILLIAM BULOW; URBAN MASS TRANSPORTATION ADMINISTRATION (UMTA); BROCK ADAMS; JOSE CAMALLONGA; RICHARD S. PAGE; HAROLD B. WILLIAMS; NEAL CAVANOUGH and SIEGFRIED CONSTRUCTION FO., INC.,; HERBERT F. DARLING and HERBERT F. DARLING, INC.; IRVING FRANCIS and JOHN W. COWPER CO. INC.; S.H. BARTHOLOMEW and FRUIN COLNON/ TOM TRAYLOR/TRAYLOR BROS.; WILLIAM STERLING and ONYX CONSTRUCTION & EQUIPMENT CO.,

CIV-80-1075E

MEMORANDUM and ORDER

Walter L. Jones pro se, a former plaintiff in this civil rights action has moved for my disqualification pursuant to 28 U.S.C. §§455(a) and 455(b)(1) on grounds of this Court's alleged bias and prejudice towards him. Although Jones, as a non-party to this action, technically does not have the right to bring such a motion, it has been decided to treat it as a proper motion given the gravity of the allegations.

The motion is centered on Jones' displeasure with certain rulings in this matter. As stated in the October 3, 1985 opposition affidavit from the Assistant United States Attorney representing defendant Urban Mass Transit Administration in this matter, the motion is "devoid of any factual basis for concluding that [the Court] has demonstrated personal bias against Walter L. Jones at any stage of these proceedings." Jones's displeasure stems from the decision to dismiss certain defendants from the case and to dismiss Jones's individual claims for lack of standing. The reasons for these rulings can be found in this Court's decisions of April 22, 1981, November 3, 1981 and February 12, 1985 and are further being considered in the contxt of pending motions for certification pursuant to Fed. R. Civ. P. rule 54(b) as to which a separate opinion shall issue shortly. Adverse rulings in and of themselves are not a sufficient basis for disqualification. See In Re International Business Machines Corp., 618 F. 2d 923 (2d Cir. 1980). Jones mistakenly reads into certain decisions -- and the subsequent adherence

to such -- a personal animus. Part of the problem my be Jones's lack of experience with proper legal procedures. For example, he appears to believe that this Court's decision not to permit certain interlocutory appeals in some improper fashion cuts short his individual rights of access to the judicial process. However, while such certainly has the effect of delaying ultimate disposition insofar as Jones is concerned, they do not deprive him of ultimate assess to the appellate court. It is the rare case in which all parties to a lawsuit will be satisfied with a court's decisions and those of which Jones complains in this case have unquestionably been facially severe [1] in their effect on Jones.

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[1] The dismissal as to certain defendants has an obviously severe effect because he and his corporation are precluded from recoveries from them. This result was intended and flows from a sanction imposed upon the plaintiff corporation due to procedural default. See this Court's Order of November 3, 1981 and Memorandum and Order of February 12, 1985. The putting out of this case of Jones as an individual works no harm at all upon him. He is the 100% owner and executive of the corporation and the latter was the bidder for the work in question. Jones is a Black and claims racial discrimination but his corporation makes and pursue the identical claim. Jones was not a bidder and he was not directly damaged in any way. If his corporation was damaged so was Jones, but only indirectly and derivatively. If the corporation prevails in this litigation, Jones will not benefit directly but he will thereby and thereafter be the sole owner and executive of a financially enhanced corporate entity.

Nonetheless such decisions were based on an honest appraisal of the legal principles involved. They will be subject to review at an appropriate time as they should be. They do not reflect any past or present bias or prejudice towards Jones. Jones has not presented any facts -- other than the adverse results -- on which to base the present motion to disqualify. No such facts exist. The mere fact of adverse decisions creates no appearance of impropriety. Accordingly,

Jones's motion to disqualify is hereby ORDERED denied.

Dated: Buffalo, N.Y.
October 11, 1985

_____

U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES & WALTER L. JONES DEVELOPMENT CORPORATION, INC.
Plaintiff,

-v-

CIVIL 80-1075E

NIAGARA FRONTIER TRANSPORTATION AUTHORITY, et al.,
Defendants.

SIR/MADAM: Take notice of an ORDER, which the within is a copy, duly granted in the within entitled action on the 15th day of October, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 16th day of October.

Dated: Buffalo, New York
October 16, 1985

JOHN K. ADAMS, CLERK
United States District Court
Western District oc New York
U.S. Courthouse
Buffalo, New York 14202

cc: See Attached List

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES and WALTER L. JONES DEVELOPMENT CORPORATION, INC.,

Plaintiffs,

-v-

NIAGARA FRONTIER TRANSPORTATION AUTHORITY (NFTA): JAMES H. WOLFORD; GEORGE L. WESSEL; RICHARD C. SOUTHARD; JOHN F. DOWNING; WILLIAM G. GISEL; JOHN F. KOPCZYNSKI; WILLIAM H. WENDEL; TED BECK; CHESTER R. HARDT; GEORGE J. TRIMPER; ALFONSO V. BELLANCA; JACK BAYER; WILLIAM E. STRAUB; JACOB F. SCHOELLKOPF V; JAMES E. KELLY; KENNETH G. KNIGHT; WILLIAM BULOW; URBAN MASS TRANSPORTATION ADMINISTRATION (UMTA); BROCK ADAMS; JOSE CAMALLONGA; RICHARD S. PAGE; HAROLD B. WILLIAMS; NEAL CAVANOUGH and SIEGFRIED CONSTRUCTION FO., INC.,; HERBERT F. DARLING and HERBERT F. DARLING, INC.; IRVING FRANCIS and JOHN W. COWPER CO. INC.; S.H. BARTHOLOMEW and FRUIN COLNON/ TOM TRAYLOR/TRAYLOR BROS.; WILLIAM STERLING and ONYX CONSTRUCTION & EQUIPMENT CO.,

Defendants.

CIV-80-1075E

MEMORANDUM AND ORDER

Presently pending in this involved civil rights action are numerous motions by plaintiff[1] and by various defendants which shall be treated seriatim.

A preliminary word about the Amended Complaint

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[1] Notwithstanding the caption, Walter L. Jones Development Corporation, Inc., is the only plaintiff in this case — as shall be examined infra.

is in order. The plaintiff's lengthy history of amended pleadings are most recently the subject of decisions by this Court dated May 2, 1985 and May 29, 1985. The viable complaint in this case continues to be, as stated in the May 29 Order, the Proposed Amended and Supplemental Civil Rights Complaint attached as Exhibit 2 to the April 25, 1985 Affidavit of Barbara M. Sims, Esq. The plaintiff heatedly has asserted that the proper complaint should be a so-called Amended Complaint dated May 10, 1985, purportedly filed and served in accordance with this Court's oral permission, given off the record in court April 1, 1985, to file a corrected version of the proposed April 25th pleading -- such corrections to be limited to spelling and punctuation changes and such grammatical changes as would not bear upon the substance of the pleading. The May 10th pleading was deemed a nullity by the May 29th Order because it was not in compliance with this Court's instructions. The plaintiff asserts -- inaccurately -- that the May 10th pleading contained so substantive changes from the version

as to which leave to file and serve had been granted. Even a casual comparison of the two documents shows this not to be true. The point here is not to humiliate the plaintiff by preventing correction of spelling and comparable errors but to force the plaintiff -- given its pleading history -- to take an appropriate degree of responsibility for the documents it submits. Accordingly, further changes shall not be permitted at this time with the single exception that the clarifying substitution of "the Grantee's" for "its" in Paragraph 41 of the April 25th pleading shall be deemed to have been made. Such action, of course, shall not require further pleading by defendants inasmuch as the substance of the Amended Complaint will remain unchanged.

The plaintiff also has moved, pursuant to Fed. R. Civ. P. rule 54(b), for a certification of two previous orders of this Court for the purpose of taking an immediate appeal. Specifically the plaintiff seeks immediate review of this Court's decision of April 22, 1981 as reiterated in a February 12, 1985 Mamorandum and Order dismissing Walter L. Jones's individual claims,

and of this Court's November 2, 1981 Order, also restated in the February 12th Memorandum and Order, dismissing the plaintiff's claims as to a number of defendants. In fact this Court did certify the entry of final judgement as to the dismissal of Jones's individual claims by an order signed April 10, 1985. As appeal was taken but later withdrawn in light of the requirement set forth in Ansam Associates, Ins. v. Cola Petroleum, Ltd. ("Ansam"), 760 F. 2d 442, 445 (1985), that a district court provide a "brief, reasoned explanation" as part of a rule 54(b) certification.

Further consideration convinces that the plaintiff's motions for rule 54(b) certification should be denied. Ansam reemphasizes the importance of avoiding piecemeal appeals and the consequent infrequency of situations where rule 54(b) certification is appropriate.

> A district court should grant certification only when there exists 'some danger of hardship or injustice through delay which should be alleviated by immediate appeal.' Campbell v. Westmoreland Farm, Inc., 403 F. 2d 939, 942 (2d Cir. 1968)." Ansam, supra, at 445.

No such showing has been made in this case. The plaintiff's alternative motions to vacate the April 22, 1981, November 3, 1981 and February 12, 1985 decisions similarly are denied. The April 10, 1985 Order of Certification will be vacated.

This Court's May 2, 1985 Order granting leave to file and serve the April 25th Proposed Amended Complaint was made without prejudice to the renewal or submission by defendants of appropriate motions. Given the stricture of Fed. R. Civ. P. rule 15(a) that leave to amend "shall be freely given when justice so requires", it is the normal practice of this Court to permit a plaintiff upon motion to file and serve an amended complaint except for the rare case in which the defendant makes a strong showing of prejudice due to the fact of amendment in and of itself, as opposed to an attack on the substance of such. Indeed this Court will not normally consider the underlying proposed pleading until such time as it has been filed and served, leaving to the parties the burden of attacking or defending it as appropriate. Such

motions are now before me in this case.

Certain "defendants"[2] urge dismissal of Jones's individual claims based upon the April 22, 1981 and February 12, 1985 rulings. This Court has explained in those decisions its conclusion that Jones does not have individual standing to sue in this case and has not been made aware of any reason to change its conclusion.[3] Accordingly,

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[2] Such movants, not all of whom are named in the present complaint, are: Donald J. Blair and Building Trades Council of Buffalo and Vicinity; Ronald M. Fino and Laborers Local Union No. 210; Joseph F. Colern, and Michael Fitzpatrick and Ironworkers Local Union No. 6; Leonard S. Coniglio and Cement Masons Local Union No. 511; Loe Hopkins and Operating Engineers Local Union No. 17, 17a and 17b; Donald J. Blair as Official of Construction Industry Coalition for Economic Recovery Western New York; Asbestos Workers Local Union No. 4 and Jack Kellerher;Boiler Makers Local Union No. 7 and John Barry Jarzynski; Bricklayers Local Union No 45 and James Joseph McGovern; Electrical Workers Local Union No. 41 and Melbourne H. Rich; Elevator Constructors Local No. 14 and Donald M. Winkle; Glaziers Local Union No. 660 and James J. Coyle; Painters District Council No. 4 and Jim V. Griffo; Plasterers Local Union No. 9 and Samuel F. Antonio; Roofers Local Union No. 74 and Angelo Pagnano; Sheet Metal Workers Local Union No. 71 and George J. Cuddihy; Steamfitters Local Union No. 395 and Donald J. Blair; Tile, Marble & Terrazzo Workers Helpers Local Union No. 8 and Daniel J. Mecca; and Construction Employers Association, Inc., John M. Fuhrmann (Officer).

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[3] In a letter to this Court dated September 18, 1985 and copied to thie defendants, Jones reiterated his belief that he should be a party to this action and submits, presumably as support for that position xerograhiic copies of Black Brothers Combined, Etc. v.

defendants' motions will be granted. Jones is not a party to this case and further submissions by him or attempts by him or others to circumvent that decision will be of no effect.[4]

Certain of the defendants[5] also assert that

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3 Cont.
City of Richmond, 386 F. Supp. 147 (E.D.Va. 1974), Minority Emp., Etc. v. Tenn. Dept. of Employ. Sec., 573 F. Supp. 1346 (M.D.Tenn. 1983), and Howard Sec. Serv. v. Johns Hopkins Hospital, 516 F. Supp. 508 (D.Md. 1981). These cases do not, however, support Jones's position on individual standing and address, rather, corporate and organizational rights of action under the civil rights statues. The generic fact that in certain instances corporations or individuals or both may have rights of action under the civil rights statutes does not mean that Jones has standing under the circumstances of this case. As has been more adequately exlained in previous decisions of this Court, there are often drawbacks as well as advantages to the act of incorporation but, having availed himself of such legal status, Jones may not so easily dismiss or shed it.

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4 This Court is aware that Jones inevetably will play a role in this case in his capacity as President and sole stockholder of the corporate plaintiff and trusts that its attorney will exercise judgement to see that this relatively narrow testimonial function is not abused so that no further restrictions will be required.

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5 Movants are: Donald J. Blair and Building Trades Council of Buffalo and Vicinity, Ronald Fino and Laborers Local Union No. 210; Joseph Colern and Michael Fitzpatrick and Ironworkers Local Union No. 6; Leonard S.Coniglio and Cement Masons Local Union No. 511; Leo Hopkins and Operating Engineers Local Union Nos.17, 17a and 17b; Construction Industry Employers Association, Inc., John M. Fuhrmann (Officer); Carpenters District Council, Herman F. Bodewes; Lathers Local Union No. 32, Frank A Sciabarrisi; National Electrical Contractors Association, Western New

the Amended Complaint should be dismissed as to them because claims as to them had been "dropped without leave to further amend and with prejudice" by this Court's November 2, 1981 Order and as restated by the February 12, 1985 Memorandum and Order. The events giving rise to such result have been set forth in the previous decisions. The Plaintiff's premise for reconsideration is the same now as it was then -- that its then attorney of record acted in some fashion ultra vires and contrary to instructions and that it is unfair to penalize it for the attorney's purported misconduct. There is no question that the dismissal of certain defendants without

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5 Cont.
York Chapter; Plumbing Contractors Association of Erie County, New York, Inc.; and S&M Constructors, Inc. and their officers.

Defendant S&M Constructors, Inc., ("S&M:) points out that the present Amended Complaint names two of its officers -- John Den Beste and Elton Grant — as opposed to the previously named officer — Victor Scaravelli. As such defendant asserts, the allegations of the complaint are not directed against such officers as individuals. The plaintiff has not asserted, and this Court cannot find, any reason why any dismissal as to S&M should not preclude the claims against Den Beste and Grant and the motion will be decided on that basis.

Similarly, the attorney for Carpenters District Council asserts — and this Court accepts — tjat Lathers Local Union No. 32 was merged into the Carpenters District Council of Buffalo & Vicinity in September 1979 so that any ruling as to Carpenters District Council and Herman Bodewes would also apply to Lathers Local union No. 32 and Frank A. Sciabarrasi.

adjudicating the merits as to them is in some sense a harsh result. Nonetheless, as explained in the previous decisions, it is amply justified in this case. Moreover, the plaintiff's assertion that it was unaware of this Court's decision to dismiss such defendants and consequently waited nearly a year to challenge such decision strains credulity in light of its and Jones's history of close involvement in the case. Nor is this a situation in which failure to keep abreast of activities of counsel and actions by a court might be explained by such factors as the pro se status of a litigant, lack of education or inability to grasp these particular legal issues and consequences.

Defendant Niagara Frontier Transportation Authority (NFTA) has moved to dismiss or for summary judgement asserting that the present action is barred by res judicata and that the Amended Complaint fails to state a valid claim against it.

The res judicata argument is based upon an October 16, 1979 Order of Judge Curtin in Walter L. Jones Development Corporation v. Niagara Fron-

tier Transit Authority, CIV-79-546C (such defendant inexplicably has not cited this case and has not provided a copy of such Order although my efforts have since located it). Such order dismissed the complaint therein due to the corporate plaintiff's failure to appear at a scheduled oral argument of the defendant's motion to dismiss on substantive grounds. The NFTA currently asserts that such order has a claim preclusive effect but is incorrect as to the extent of that preclusion. Although not expressly so stated, the October 16th Order was clearly entered pursuant to Fed. R. Civ. P. rule 14(b) and rule 30A of the Local Rules of Procedure of this Court. As such, and plaintiff's citation of state authorities notwithstanding, the issue here is one of federal law. See Spangler v. C.I.R., 323 F. 2d 913 (2d Cir 1963). I is clear that an involuntary dismissal for failure to prosecute under rule 41(b) operates as an adjudication upon the merits "although the substantive issues of the case are never reached." Saylor v. Lindsley, 391 F. 2d 965, 968 (2d Cir. 1968). See Costello v. United States,

365 U.S. 265, 285 (1961); Browning Debenture Holders' Com. v. Dasa Corp., 605 F. 2d 35 (2d Cir. 1978); Harrelson v. United States, 613 F. 2d 114 (5th Cir. 1980). Precisely because substantive issues are never reached such adjudication is given res judicata effect but not necessary collateral estoppel effect. Accordingly, while the plaintiff is precluded from relitigating the causes of action presented in CIV-79-546C claims which could not have been brought prior to the October 16th Order were not extinquished. See Lawlor v. National Screen Service, 349 U.S. 322 (1955). It is clear that most of the claims against the NFTA in the Amended Complaint in this case, while involving similar issues to those presented in CIV-79-564C, allege "new" facts. Arguably there are some gray areas as to which claims in the present case sould have been brought in the previous action. The NFTA, however, which has the burden on this motion, has not compared the two complaints in any detailed analytical fashion. Accordingly, the NFTA's motion to dismiss will be granted only as to such causes of action explicitly set forth

in CIV-79-546C and of course only insofar as such pertain to the NFTA.

The NFTA has also moved to dismiss the action pursuant to Fed. R. Civ. P. rule 12 (b) (6) for failure to state a claim. In support of such motion, the NFTA relies on the May 4, 1981 affidavit of John F. Downing previously filed in this case. Downing's affidavit was before this Court when it considered the plaintiff's motion for preliminary injunction. Such motion was denied by Order of August 28, 1981. The rationale for the Order was set forth in a Memorandum filed October 7, 1981. That memorandum touched on, in general sense, a number of troublesome questions in the case, which had not been adequately explored by the parties. Downing's affidavit, which contains essentially no legal analysis and does little more than assert that the NFTA properly exercised its delegated authority, did not serve to clarify the issues in the case at the time it was submitted and is inadequate as a foundation for the present motion. Accordingly, the motion will be denied without prejudice. In the event such defendant

chooses to re-move, adequate legal briefing will be expected.

Defendants Irving Francis and John W. Cowper Co., Inc. ["Francis" and "Cowper"] have moved to dismiss on the dual premises that the plaintiff has failed to state a claim and that it has failed to exhaust administrative remedies. Such defendants' reliance on a memorandum of law dated October 13, 1981 highlights a difficulty posed for this Court by its permissive stance regarding incorporation in present motions of previously submitted documents. Such incorporation has been allowed to help erase the burden imposed on defendants by the frequent amendment of the complaint. When, however, a defendant fails to identify precisely which documents it is relying on - which has been the case with some defendants -- or fails to update stale memoranda which to some extent is the case here,[6] this Court is left in the difficult position of trying to fill gaps.

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[6] The memorandum in question was presented on behalf of these and other defendants (who have since retained different counsel). Moreover, certain contentions in the memorandum with regard to the Complaint in existence

It is particularly important in a case as diffuse as this one -- both in terms of paper generated and certain of the issues -- that counsel for all parties strive to clarify their presentations.

The exhaustion of remedies issues has been addressed in this Court's August 28, 1981 Memorandum and resolved in plaintiff's favor. Although that decision was reached in the context of a motion for a preliminary injunction, the legal reasoning has a more general viability. The defendants have not raised any reasons why such conclusions should be reconsidered. The motion to dismiss for failure to exhaust administrative remedies will be denied.

A motion to dismiss pursuant to Fed. R. Civ. P. rule 12(b) (6) will not be granted unless it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim

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6 Cont.
at that time appear to be mooted by the present Amended Complaint. This Court will not attempt to analyze these discrepencies but will treat the broad assertions raised by the present motion and only, of course, in the context of those defendants presently moving.

which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

> "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover it is well established that, in passing on a motion to dismiss, *** the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

There appear to be two broad branches to the defendants' motion to dismiss. On the one hand, as the argument goes, the plaintiff does not have a private right of action as to the defendants. On the other hand, the defendants assert, the plaintiff's allegations are too conclusory to support a cause of action.[7]

The defendants' efforts to ensnare the plaintiff in the web of regulations and executive orders governing Minority Business Enterprises

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[7] The October 13 Memorandum also makes brief reference, without legal support, to a supposed failure by the plaintiff to state a cause of action against Francis in his individual capacity. Assuming that such defendant intends to pursue this argument, a properly briefed motion to that effect will be considered if and when made.

has some logical correlation to the exhaustion of remedies argument but is equally unavailing. Inasmuch as the plaintiff brings this action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., among other statutes, and the rules and regulations cited by the defendants being mere means of implementing such, it is unnecessary to delve beyond Title VI itself. And, while such result has been reached in a backhanded fashion, it is clear that a private right of action is available under Title VI. Cannon v. University of Chicago, 441 U.S. 677 (1979). See also, Ass'n Against Discrimination v. City of Bridgeport, 479 F. Supp. 101 (D. Conn. 1979). aff'd in part and vacated in part on other grounds, 647 F. 2d 256 (2d Cir. 1981).

The defendants' argument is much stronger with regard to the lack of fact-pleading in the complaint. Although the broad contours of the plaintiff's case are clear enough, the specific facts -- dates, transactions and so forth -- which would bring these and other defendants into the general picture are barely, if at all,

made clear. Yet there is a generalized factual structure that has been alleged here -- the fact of certain contracts, the fact of government programs concerning such, the fact that many, if not all defendants were involved in the project -- directly or indirectly --, the apparent fact that the plaintiff was low bidder on certain contracts but was not awarded them. While it has been stated that "complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed", Ostrer v. Aronwald, 567 F. 2d 551 (2d Cir. 1977), the same court has held that

> "[a]n action, especially under the Civil Rights Act, should not be dismissed at the pleadings stage unless it appears to a certainty that plaintiffs are entitled to no relief under any state of the facts, which could be proved in support of their claims." Escalera v. New York City Housing Authority, 425 F. 2d 853, 857 (2d Cir.), cert. denied, 400 U.S. 853 (1970).

The present complaint and its allegations against the defendants may well border on what is unacceptable but this Court cannot state with the "certainty" described in Escalera that no set

of facts could be proved to support the plaintiff's claims. Discovery should bring a needed degree of focus to the issues which may well be susceptible of more reasoned analysis through summary judgement motions. Further amendment of the complaint at this stage of the proceedings would appear to be a futile exercise. The defendants' motion will be denied.

The same rationale must govern with respect to the motion of defendant Urban Mass Transportation Administration (UMTA) to dismiss or alternately for summary judgement. UMTA relies in support of its motion on a Memorandum dated October 13, 1981. The gist of such defendant's argument, generally stated, is that consistently with its traditional practice UMTA had largely deferred to the local agency -- defendant Niagara Frontier Transportation Agency (NFTA) --, that the NFTA's determination that the plaintiff was not a responsible bidder on the contracts in question was made in accordance with law and all applicable federal requirements and that to the extent UMTA was called upon to review such decision it did so and agreed with it.

For the reasons previously stated, such defendant's motion to dismiss pursuant to rule 12(b)(6) will be denied. The alternative motion for summary judgement is premature and will be denied with prejudice.

Various motions have ben made by plaintiff to join the United States Department of Justice as an involuntary plaintiff in this case and seeking to disqualify the United States Attorney for the Western District of New York from representing UMTA. Because of the supporting papers for these motions and indeed the motions themselves are submitted by or on behalf of Jones who has no standing in this lawsuit, they will not be considered. Should the plaintiff choose to move on its own behalf for similar relief at a future date such motion will be considered. In the event this Court finds such motion to be frivolous, an award will be made of any costs incurred in defending against it.

Motions by the plaintiff for default and summary judgement were withdrawn at oral argument September 16, 1985 as was defendant Mechanical Contractors Association's motion to set aside

service of process. All requests for fees are ORDERED denied without prejudice. Pending and additional discovery issues will be referred to a United States Magistrate for the Western District of New York. Accordingly, the plaintiff's motions for certification of this Court's dismissal of Jones's individual claims and for certification as to the dismissal of certain defendants by the November 2, 1981 Order are hereby ORDERED denied and the April 10, 1985 Order of certification hereby ORDERED vacated.

The defendants' various motions for summary judgement as to Jones's individual claims and to dismiss as to renewed claims brought against defendants dismissed by the November 2, 1981 Order are hereby ORDERED granted.

Defendant NFTA's motion to dismiss is hereby ORDERED granted as to the causes of action enumerated in CIV-79-546C.

Defendant Francis's and defendant Cowper's and defendant UMTA's motions to dismiss or for summary judgement are hereby ORDERED denied. The above-entitled action is hereby ORDERED referred to the Honorable Edmund F. Maxwell, United States

Magistrate for the Western District of New York who, as authorized by rules 16 and 35 of the Local Rules of Practice of this Court, shall schedule and oversee conferences with the attorneys for the parties for the purposes set out in Fed. R. Civ. P. rule 16 and shall hear and deterrmine all non-dispositive pretrial motions as authorized by 28 U.S.C. §636(b)(1)(A).

Dated: Buffalo, N.Y.
October 15, 1985

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U.S.D.J.

APPENDIX B

DECISIONS BELOW
(IN THE NO. TWO CASE)

[Here are set forth, sucessively, the opinions of the U. S. Court of Appeal for the Second Circuit, affirming the District Court's decision and Judgement of the District Court, for the Western District of New York, Erie County, dismissing the No. Two case in its entirety, upon the grounds that the No. Two case is substantially identical to the No. One case.]

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for theSecond Circuit, held at the United States Courthouse in the City of New York, on the 8th day of May, One thousand nine hundred and eighty-six.

Present: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE AMALYA L. KEARSE,
HONORABLE ROGER J, MINER,

Circuit Judges

WALTER L. JONES, individually and WALTER L. JONES, as sole stockholder of WALTER L. JONES DEVELOPMENT CORPORATION, INC.,

Plaintiffs-Appellants,

- v. -

No.85-7194

SIEGFRIED CONSTRUCTION CO., INC., et al

Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by Plaintiff pro se and was submitted by defendants.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgement of said District Court be and it hereby is affirmed.

" Plaintiff pro se Walter L. Jones appeals from a final judgement of the United States District Court for the Western District of New York, John T. Elfvin, Judge, dismissing his complaint

on the ground that it asserts claims substantially similar to those asserted in another pending action commenced by Jones and his wholly-owned corporation, Walter L. Jones Development Corporation, in 1980 ("1980 action"). On appeal, Jones contends principally that the court erred in dismissing the present action because it challenges conduct alleged to have occured after the commencement of the 1980 action. Finding no merit in any of Jones's contentions, we affirm the judgement.

The district court has the power to dismiss an action that involves the same parties, assertion of the same rights founded on essentially the same facts, and demands for the same relief as another pending action. See Watson v. Jones, 13 Wall. 679, 715 (1871); See also Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action"); Fed. R. Civ. P. 42(a) ("[w]hen actions involving a common question of law or fact are pending before the court, ... it may make such orders concerning proceedings therein as may tend to

avoid unnecessary costs ....").

The requirements as to identity of parties, issues, facts, and demands for relief are met here. Jones argues principally that the present suit alleges different facts because it focuses on events subsequent to the filing of the 1980 complaint. We are unpersuaded. First, we note that the present complaint does not purport to limit its allegations to post 1980 action events. More importantly, to the extent that Jones wishes to challenge conduct that postdates the 1980 action, he should seek leave to file in the 1980 action a supplemental complaint pursuant to Fed. R. Civ. P. 15(d) (Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurances or events which have happened since the date of the pleading sought to be supplemented."). The fact that in the 1980 action the court has entered an interlocutory order dismissing, on grounds of lack of standing, claims brought by Jones in his individual capacity does not mean that a supplemental plead-

ing cannot be filed. Rule 15(d0 provides that "[p]ermission may be granted even though the original pleading is defective in its statement of a claim for relief or defense." Accordingly, we find no abuse of discretion in the district court's dismissal of the present complaint.

We have considered all of Jones's arguments on this appeal and have found them to be without merit.

The judgement dismissing the complaint is affirmed.

ELLSWORTH A. VAN GRAAFEILAND, USDJ

AMALYA L. KEARSE, USDJ

ROGER J. MINER, USDJ

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported cited, or otherwise used in unrelated cases before this court or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WALTER L. JONES, individually and WALTER L. JONES as sole stockholder of WALTER L. JONES DEVELOPMENT CORPORATION, INC.,

Plaintiffs-Appellants,

v. 85-7194

SIEGFRIED CONSTRUCTION CO.,; NEAL CAVANOUGH; JOSEPH DIPIRRO, etc.

Defendants-Appellees

Before the Hon. Ellsworth A. VanGraafeiland
Hon. Amalya L. Kearse
Hon. Roger J. Miner

IT IS HEREBY ORDERED that the motion for suggestion for hearing appeal en banc be and it hereby is denied.

For the Court

Elaine B. Goldsmith, Clerk

May 9, 1986
(Date)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES, individually, et al.,

Plaintiff,

-v-

SIEGFRIED CONSTRUCTION CO., INC., et al.,

CIVIL 83-86E

Defendants

SIR/MADAM: Take notice of an ORDER & a JUDGEMENT of which the within is a copy, duly granted in the within entitled action on the 11th day of February, and entered in the office of the Clerk of the United States District Court, Western District of New York, on the 12th day of February.

Dated: Buffalo, New York
February 12, 1985

JOHN K. ADAMS, CLERK
U.S. DIstrict Court
Western District of New york
U.S. Courthouse
Buffalo, New York 14202

cc: Walter L. Jones
John L. Hargrave, Sr., Esq
Barbara Sims, Esq.
Michael Beilwech, Jr., Esq.
Lipsitz, Green, Fahringer, et al.
E. Joseph Giroux, Jr., Esq.
Joseph Randazzo, Esq.
Saperston , Day, Lustig, et al.
Victor Silverstein, Esq.
Jerome Gorski, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER L. JONES, individually and
WALTER L. JONES, as sole stockholder of
Walter L. Jones Development
Corporation, Inc.,
Plaintiffs,

-vs- CIV-83-86E

SIEGFRIED CONSTRUCTION CO., INC.,
NEAL CAVANOUGH; JOSEPH DIPIRRO;
JOHN W. COWPER CO., INC.; ORDER
IRVING FRANCIS; WARREN STRONG;
ALBERT-ELIA; LAWRNCE A. ELIA;
S & M CONSTRUCTORS, INC.,; VICTOR
SCARAVILLI; VINTON GABESI; AFL - CIO
COUNCIL; GEORGE L. WESSEL; CONSTRUCTION
INDUSTRY COALITION FOR ECONOMIC RECOVERY
WESTERN NEW YORK: BERNARD J. SHEVLIR;
DONALD J. BLAIR; CONSTRUCTION INDUSTRY
EMPLOYERS ASSOCIATION, INC.; JOHN M.
FUHRMANN; ROBERT R. LOGAN; NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION, INC.;
LAWRENCE J. STROHT; PLUMBING CONTRACTORS
ASSOCIATION OF ERIE COUNTY, N.Y., INC.;
FRANK A SCIBETTA; MECHANICAL CONTRACTORS
ASSOCIATION OF BUFFALO & VICINITY, INC.;
MARSHALL DAVIS; WESTERN NEW YORK DUMP TRUCK
OPERATORS ASSOCIATION; LESLIE A. SPRAGGON;
BOILER MAKERS EMPLOYERS ASSOCIATION OF BUFFALO,
NEW YORK & VICINITY; LOUIS D. MADIA; GREATER
BUFFALO SHEET METAL & ROOFING ASSOCIATION;
PAUL GILBERT; ASBESTOS WORKERS LOCAL UNION
NO. 4; JACK KELLEHER; BOILER MAKERS LOCAL
UNION NO. 7; JOHN BARRY JARZYNSKI; BRICKLAYERS
LOCAL UNION NO. 45; JAMES JOSEPH McGOVERN;
CARPENTERS DISTRICT COUNCIL OF BUFFALO &
VICINITY; HERMAN F. BODEWES; CEMENT MASONS
LOCAL UNION NO. 511; LEONARD S. CONIGLIO;
ELECTRICAL WORKERS LOCAL UNION NO. 41;
MELBORNE H. RICE; ELEVATOR CONSTRUCTORS
LOCAL NO. 14; DONALD M. WINKLE; GLAZIERS
LOCAL UNION NO. 660; JAMES J. COYLE;
IRONWORKERS LOCAL UNION NO. 6; JOSEPH F.
COLERN; LABORERS LOCAL UNION NO. 210;
RONALD M. FINO; LATHERS LOCAL UNION NO. 32

FRANK A. SCIABARRASI; OPERATING ENGINEERS LOCAL NO. 17; LEO HOPKINS; PAINTERS DISTRICT COUNCIL NO. 4; JIM V. GRIFFO; PLASTERERS LOCAL UNION NO. 9; SAMUEL F. ANTONIO PLUMBERS LOCAL NO. 36; LARRY CONNELLY; ROOFERS LOCAL UNION NO. 74; ANGELO PAGANO; SHEET METAL WORKERS LOCAL UNION NO. 71; GEORGE J. CUDDIHY; SPRINKLER FITTERS LOCAL UNION NO. 703; WILLIAM G. THOMPSON; STEAMFITTERS LOCAL UNION NO. 395; DONALD J. BLAIR; TILE MARBLE & TERRAZZO WORKERS HELPERS LOCAL UNION NO. 8; DANIEL J. MECCA; TRUCK DRIVERS LOCAL UNION NO. 449 and EDWIN M. WALKER,

Defendants

Plaintiffs having appeared before this Court November 19, 1984 pursuant to an Order to Show Cause why the case should not be dismissed as involving claims substantially identical to those asserted in Walter L. Jones and Walter al. Jones Development Corporation, Inc., v. Niagara Frontier Transportation Authority, (NFTA), et al., CIV-80-1075E (including claims dismissed by me April 17, 1981 Order therein) and as involving among others certain defendants as to whom similar complaints were on November 2, 1981 ordered dismissed with prejudice by this Court in CIV-80-1075E,[1] this Court having consid-

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[1] See also Memorandum and Order of this Court in CIV-80-1075E dated December 6, 1982, aff'd, Jones v. Niagara Frontier Transp. Authority, 722 F. 2d 20 (2d Cir. 1983).

ered oral argument and written submissions by the parties, and it is being apparent that two indicated actions are substantially identical, it is hereby ORDERED that this action is dismissed.[2]

Dated: Buffalo, N.Y.
February 11, 1985

U.S.D.J.

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2 Although plaintiffs have asserted that certain "new events" arising out of but subsequent to the intitial discrimination as alleged in CIV-80-1075E justify this new action, such events, to the extent they state a legally cognizable claim and to the extent they involve defendants presently named in CIV-80-1075E or defendants other than those previously dismissed from CIV-80-1075E as indicated, are properly the subject of supplemental pleadings in CIV-80-1075E rather than the basis for a distinct lawsuit.

JUDGEMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

CASE TITLE

WALTER L. JONES, Individually, etc.

v.

SIEGFRIED CONSTRUCTION CO., INC., et. al.

DISTRICT
WESTERN DISTRICT OF NEW YORK

DOCKET NUMBER
CIVIL 83-86E

NAME OF JUDGE
HONORABLE JOHN T. ELFVIN

JURY VERDICT This action came before the court with the judicial officer named above presiding. The issues have been tried and the jury has renderedits verdict.

XX DECISION BY COURT This action came to hearing before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to Order signed February 11, 1985 and Filed February 12, 1985, it is hereby Ordered that this action is dismissed.

CLERK

John K. Adams Buffalo, New York 14202

Date

APP-70 Feb. 12, 1985

APPENDIX C

REQUEST FOR RECORDS

[Here is set forth, the Petitioner's request for the Briefs, Reply Briefs, Appendix, and entire Record, to be transmitted to this Court, for the herein cases.]

WALTER L. JONES
204 Kings Highway
Snyder, New York 14226
(716) 839-2696

July 29, 1986

Elaine B. Goldsmith,
Clerk
U.S. Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Re: Walter L. Jones v. N.F.T.A., et al
Appeal docket no. 85-7836, and
District Court no. 80-1075E
and
Walter L. Jones v. Siegfried Const. Co., Inc., et al - Appeal docket no 85-7194, and District court no. 83-0086E

Dear Madam:

The Petitioner, Walter L. Jones hereby, in accordance to the U.S. Supreme Court rules 13.1 and 19.1, request that this court certify the Petitioner's Briefs, Reply Briefs, Appendix, and the entire Record, and supplements thereto, in the above captioned cases and provide for their transmission to the U.S. Supreme Court, in support of a petition for Certiorari, and Extraordinary Writ, on my behalf.

Very truly yours,

Walter L. Jones

Walter L. Jones, Pro se

cc: Joseph F. Spaniol, Jr.,
U.S. Supreme Court Clerk
See attached (attorney distribution sheet

APPENDIX D*

NAMES OF ALL OTHER PARTIES TO THESE CASES*

[Here are set forth, the names of all other parties to these herein cases.]

* The other parties to these cases are: Respondent Co-Plaintiff, WALTER L. JONES DEVELOPMENT CORPORATION, INC., and Respondent Defendants, NIAGARA FRONTIER TRANS PORTATION AUTHORITY, (NFTA), JAMES H. WOLFORD, GEORGE L. WESSEL, RICHARD C. SOUTHARD, JOHN F. DOWNING, WILLIAM G. GISEL, JOHN F. KOPCZYNSKI, WILLIAM H. WENDEL, JACK BAYER, CHESTER R. HARDT, CEORGE J. TRIMPER, ALFONSE V. BELLANCO, TIMOTHY J. TOOHEY, ERNESTINE R. GREEN, JACOB F. SCHOELLKOPF, V., JAMES E. KELLY, KENNETH G. KNNIGHT, WILLIAM BULOW, ROBERT D. GIOIA, RONALD J. ANTHONY, RICHARD F. GALLAGHER, THEODORE BECK, (Officials and Administra tors), URBAN MASS TRANSPORTATION ADMINISTRATION, (UMTA), HIRAM J. WALKER, BROCK ADAMS, ROBERT PARTRICELLI, JOSE CAMALLONGA, RICHARD S. PAGE, HAROLD B. WILLIAMS, WESLEY A. PLUMMER, WILHEMEMIA BURKE, ARTHUR B. TEELE, ANDREW LEWIS, (Officials and Administrators), NEW YORK STATE DEPARTMENT OF TRANSPORTATION (NY DOT), NEAL CAVANAUGH, JOSEPH DIPIRRO, SIEGFRIED CONSTRUCTION CO. INC., JOHN J. SANDERS, SLATTERY ASSOCIATES, INC., IRVING FRANCIS, GERALD MILLER, JOHN W. COWPER CO. INC., S.H. BARTHOLOMEW, FRUIN - COLNON, TOM TRAYLOR, TRAYLOR BROS., WILLIAM STER LING, ONYX CONSTRUCTION & EQUIPMENT CO., JOHN M. FUHRMANN, ROBERT M. LOGAN, CONSTRUCTION INDUSTRY EMPLOYERS' ASSOCIA TION, DONALD J. BLAIR, BUILDING TRADES COUNCIL OF BUFFALO AND VICINITY, RONALD M. FINO, LABORERS LOCAL UNION NO. 210, JOSEPH F. COLERN, MICHAEL FITZPATRICK, IRON WORKERS LOCAL UNION NO. 6, LEONARD S. CONIGLIO, CEMENT MASONS'LOCAL UNION NO. 511, HERMAN F. BODEWES, CARPENTERS DISTRICT COUNCIL, LEO HOPKINS, OPERATING ENGINEERS LOCAL UNION NO. 17, 17A, 17B, LAWRENCE J. STROH, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, PLUMBING CONTRACTORS ASSOCIATION OF ERIE COUNTY, N.Y., INC., ALBERT ELIA BUILDING COMPANY, INC., LAWRENCE A. ELIA,(Officer), S & M CONSTRUCTORS, INC., JOHN DENBESTE, ELTON T. GRANT, AFL-CIO COUNCIL, GEORGE L. WESSEL, CONSTRUCTION INDUSTRY COALITION FOR ECONOMIC RECOVERY, WESTERN NEW YORK, (Coalition), BERNARD J. SHEVLIR, DONALD J. BLAIR, MARSHALL DAVIS, MECHANICAL CONTRACTORS ASSOCIATION OF BUFFALO & VICINITY, INC., (As sociation). BOILER MAKERS' EMPLOYERS ASSOCIATION OF BUFFALO & VICINITY, LOUIS D. MADIA, (Official), GREATER BUFFALO SHEET METAL & ROOFING ASSOCIATION, PAUL GILBERT,(Official), ASBESTOS WORKERS LOCAL UNION NO. $, JACK KELLEHER, (Offi cial), BOILER MAKERS LOCAL UNION NO. 7, JOHN BARRY, (Official), BRICKLAYERS LOCAL UNION NO. 45, JOHN JOSEPH MCGOVERN, ELECTRICAL WORKERS LOCAL UNION NO. 41, MELBOURNE H. RICH, (Official), ELEVATOR CONSTRUCTORS LOCAL NO. 14. VICTOR SCARAVILLI AND S & M McHUGH KENNY, OSCAR RAYFORD.

AND UNIVERSAL EQUIPMENT & CONSTRUCTION CO., EDWARD COLE AND TRESCO DISTRIBUTING, CARMEN A GALLO, AND AMIGA CONSTRUCTION, EMAMUEL HUMES AND HUMES INDUSTRIAL ELECTRICAL, AND HUMES CONTRACTING CO., JOSEPH MYLES AND TRASHLAND TRUCKING, ROBERT CHESTER AND KEYSTONE STEEL, ROBERT L. PITTS AND P & S SUPPLY, JAMES LYLE AND L & W CONCRETE, DEVILIUS GRAY AND AFTCO INTERNATIONAL TRADING CO., PAUL HARRISON AND DOWNTOWN DUMP TRUCK SERVICE, DEAN WILLIAMS AND NATIVE AMERICAN CONSTRUCTION COMPANY, WILLIAM TABORN AND NELSON, PETERS, ASSOCIATES.